(23,006)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 164.

CARL EBERLE AND STEPHEN H. CARROLL, PLAINTIFFS IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

	Original.	Print
Caption	a	1
Record from circuit court of Jackson county, Michigan	1	1
Information	1	1
Bill of exceptions	2	1
Motion to quash	3	2
Ruling of the court on motion to quash	4	3
Testimony of Geo. H. Bean	5	3
Luther D. Little	7	5
Wilmer E. Robinson	8	5
John A. Welch	8	5
John Pulling	8	5
Luther D. Little (recalled)	9	6
Frank A. Palmer	10	6
Wm. F. Heins	10	6
Defense	12	8
Testimony of Carl Eberle	12	8
Motion for verdict for defendant	14	9
Ruling of the court on motion for verdict	16	10
Defendant's requests to charge	16	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1913.

	Original.	Print
Charge of the court	17	1
Judge's certificate to bill of exception	21	1
Consent to bill of exceptions	21	1
Assignment of errors	22	1
Minute entries of argument and submission	27	1
Stipulation as to justices to participate in decisions	29	1
Opinion	30	1
Judgment	41	2
Petition for writ of error	42	2
Citation and service	43	2
Bond on writ of error	44	2
Assignment of errors	45	2
Writ of error	49	3
Clerk's certificate	51	3

a CARL EBERLE and STEPHEN H. CARROLL, Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN, Defendant in Error

RECORD.

1 STATE OF MICHIGAN,
County of Jackson, ss:

Circuit Court for the County of Jackson, November Term, in the Year A. D. 1909.

Albert O. Reece, Prosecuting attorney in and for the County of Jackson aforesaid, for and in behalf of the People of the State of Michigan, comes into said Court in the November term thereof, in the year 1909, and gives the Court to understand and be informed that heretofore, to-wit, on the first day of May, 1909, at the City of Jackson, in the county aforesaid, and on divers days and times between that time and the 11th day of September, A. D. 1909, the Eberle Brewing Company, a corporation, Stephen H. Carroll and Carl Eberle, late of the city of Jackson, in said county, did in a certain building situated at the corner of Bridge and Water streets, in the said City of Jackson, in the county aforesaid, in the plant commonly known as the Eberle Brewing Company, manufacture brewed, malt and intoxicating liquors, to-wit: beer, contrary to the provisions of a certain resolution adopted by the Board of Supervisors of the County of Jackson, State of Michigan, on the 13th day of April, A. D. 1909, in pursuance of the provisions of Act No. 207 of the Public Acts of the State of Michigan for the year A. D. 1889, as amended; the aforesaid manufacturing of brewed, malt and intoxicating liquors, to-wit, beer, having then and there been done
2 as aforesaid by the said Eberle Brewing Company, a corporation, Stephen H. Carroll and Carl Eberle, in violation of and contrary to the provisions of said Act No. 207 of the Public Acts of the State of Michigan for the year A. D. 1889, as amended, and contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

(Signed) ALBERT O. REECE,
Prosecuting Attorney.

STATE OF MICHIGAN,
County of Jackson, ss:

Albert O. Reece, being duly sworn, deposes and says that he knows the contents of the foregoing information by him subscribed, and verily believes the same to be true as therein set forth.

(Signed) ALBERT O. REECE.

Subscribed and sworn to before me this 8th day of November, 1909.
GEO. H. TOWNSEND.

1—164

The defendants upon being arraigned upon the foregoing information, pleaded thereto not guilty.

STATE OF MICHIGAN:

Circuit Court for the County of Jackson.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
THE EBERLE BREWING CO. (a Corporation), CARL EBERLE, and STEPHEN H. CARROLL.

The issue in said cause came on to be tried by a jury in said Court before the Hon. James A. Parkinson, Circuit Judge, at a session of said Court held at the Court House, in the City of Jackson, on the third day of May, 1910. Albert O. Reece, Prosecuting Attorney, and Frank L. Blackman, Assistant Prosecuting Attorney, appeared in behalf of the People, and Richard Price, appeared in behalf of the defendants, Carl Eberle and Stephen H. Carroll, at which time the following testimony was introduced, rulings made and exceptions taken.

The information contained four counts, and defendants' attorney objected that they charge separate and distinct offenses, and asked that the People be obliged to elect, whereupon the People elected to proceed upon the third count of the information, which charged the respondents with manufacturing brewed, malt
3 and intoxicating liquors, to-wit, beer, contrary to the provisions of a certain resolution, etc., as set out in the copy of the information hereto attached.

The defendants then, before proceeding to trial, filed a written motion to quash the information in said cause and discharge the defendants, for the following reasons, submitted in writing, to-wit:

First. Because Act. No. 207 of the Public Acts of the State of Michigan for the year 1889, as amended, upon which said information is based, and with the violation of which these defendants are charged, is repugnant to the Constitution of the United States and the constitution of this state, and therefore void.

Second. Because said act as amended is in conflict with paragraph 3, Section 8 of Article I. of the Constitution of the United States, giving to Congress the power to regulate commerce.

Third. Because said act as amended is repugnant to and in conflict with Section 2, Article IV. of the Constitution of the United States, which provided that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Fourth. Because said act as amended is repugnant to and violates the 14th Amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within

its jurisdiction the equal protection of the law; and also
4 violates Section 32, Article VI, of the Constitution of this State.

Fifth. Because said act, as amended, is repugnant to and in violation of the 4th Amendment of the Constitution of the United States, and Section 26 of Article VI. of the Constitution of this State, concerning unreasonable searches and seizures, and forbidding the issuance of search warrants except upon probable cause supported by oath or affirmation.

This motion is based upon the records and files in said cause.

Dated April 5th, 1910.

RICHARD PRICE,
Attorney for Defendants.

The COURT (after having read the motion): I do not think this Court ought to pass upon a constitutional question as to this law. I think that ought to be left to the higher courts. It is a very rare thing that a Circuit Judge is justified in declaring a law unconstitutional. It would be an extremely rare thing when he would be justified in declaring a law unconstitutional which has been in force twenty years, and I think the Supreme Court ought to be the first court to find it out. With reference to the motion to quash, I think I ought to dispose of it without putting counsel to the trouble of making an argument. I have no intention to be arbitrary in saying I will dispose of it without argument. But the motion to quash is based entirely upon constitutional grounds. It sets out five grounds. The local option law has been in force in Michigan for a good many years. It has been again and again under consideration by the Supreme Court
5 of this State, and that Court has never sustained any objection so far made to its validity. Under these circumstances, and because of the very character of the questions raised, I should not feel like sustaining this motion and quash the information even if these reasons were to very strongly appeal to me as being valid and well founded. I should feel a subordinate court ought not at this time after the law has been so long established and has been so repeatedly attacked and sustained to make any ruling which would invalidate it for the purposes of the case on trial. I will therefore overrule the motion of respondents' counsel to quash the information.

Mr. PRICE: We will take an exception.

The jury was then empaneled and sworn and the trial proceeded, whereupon the People called the following witnesses:

GEORGE H. BEAN, sworn for the People, testified as follows, examined by Mr. Reece:

I have been Sheriff of Jackson county since three years ago last January. Know Mr. Eberle and Carroll, and know where the Eberle Brewing Company is located, at the southeast corner of Bridge and Water streets. They conducted a brewery there, brewing lager beer prior to the first of May, 1909. I went to the place

on the 11th of September, 1909, accompanied by Deputy Sheriff Welch, Horsman and Pulling. I had a search warrant issued out of Justice Russell's court and went to search the place. We went in the south door at the bottling works; found several men at the machine washing bottles. There was a bottling machine there and several men were bottling. There was so much there I couldn't take it away, and I just took samples. I took some bottles out of the samples which I took and had them analyzed by Mr. Little, of the Schmidt Chemical Works, and also by Mr. Robinson, at Lansing. These bottles which I took for delivery were taken from the delivery wagon, from the bottling machines, from the
6 store room, from the cooler, from the barrels in the bottling room, and from one of the vats. I didn't remove any of the beer that I found there except that I took for samples. There were quite a number of barrels marked "T" and "T. B." We imagined that stood for temperance beer and the others that were not marked had a stamp on them, a revenue stamp, I guess. Those that were marked "T. B." did not have any stamp.

I had been in the brewery before, and it looked to me just the same as it always did. The men were working bottling beer, washing bottles, all steamed up and machinery running. It looked to me as it always did. I could see no difference. The stuff in the vats all looked just alike to me. It was different from the finished product which we took from the barrels. It was sour, kind of creamy color, yellowish color. It looked more cloudy. I tasted some of the samples that was lager beer, no question about it.

Witness here told of finding posted up in the brewery a United States revenue receipt, permitting the manufacture of beer for the period covered by the information.

Cross-examination:

I have no knowledge of the manufacture of beer to speak of. I don't know anything about the manufacture of temperance beer. Whether the stuff in the vats was temperance beer or lager beer. I do not know only from the analysis. I didn't drink any of the stuff in the vats; didn't take a chance on it. We sampled pretty much all the rest; tasted a lot of it around there and it tasted pretty good. Everybody helped themselves while we were trying to find out what it was. I don't know anything about the process of making beer. I don't know that was beer fermenting in the vats. I don't know how long it had been there. The place where these vats were was locked up when I got there, even the outside door. I presume that on the 1st of May when this law went into effect
7 they had a vast amount of beer in the building. From what I heard from various people I expected to find it there.

Q. You didn't expect he had taken that out and dumped it into the river, did you?

A. I didn't know.

Q. You didn't expect he would have to do that to comply with the law.

A. That was what they did at Haehnle's.

Q. Did you understand at the time you went up there that in order to comply with the local option law Mr. Eberle would have to destroy or get rid of all the beer he had on hand after the 1st of May?

A. It is my understanding if I search a place and find any quantity of intoxicating beverages, it is a violation of the law. I understood if I found beer in Mr. Eberle's possession which had been made before the first of May, and simply stored there from that time to the time I went there, it was a violation of the law. On the strength of that understanding I acted in this case. I went there again on the 31st day of December and the vats were all empty.

LUTHER D. LITTLE, sworn for the People, examined by Mr. REECE:

I am a chemist by profession and have been for 25 or 30 years. Witness here testified to the analysis which he had made of the samples which had been brought him by Mr. Bean, and that they contained a percentage of alcohol from 4.45 to 4.69 by volume. These samples were labeled when he received them in substance as follows: One taken from barrel of beer in bottling room, another taken from fermenting vat, another from delivery wagon, another from the bottling machine, and another from the store room.

8 Lager beer averages from 3½ to 4½ or 5% of alcohol.

Cross-examination.

By Mr. PRICE:

I made an analysis of one sample of the temperance beer for Mr. Bean at the same time I made the analysis of the other six. I believe that it showed no alcohol. I made an analysis of the temperance beer later, and found no alcohol in that also. The analysis of the temperance beer which I made for Mr. Bean was made on September 28th, 1909 and the analysis which I made for Mr. Eberle was made on the 14th day of March, 1910. The analysis which I made was very careful, and it showed no alcohol. I couldn't tell from the analysis how old the beer was. The temperance beer was what I would call a malt extract, nothing like lager beer.

WILMER E. ROBINSON, sworn for the People, examined by Mr. Reece testified that he was a chemist of the State Dairy and Food Department, and gave testimony showing that he had examined the same samples which Mr. Little had examined, and the result of his analysis ran about ½% higher than Mr. Little's on the same samples. The same method of analysis was followed by each of the chemists. Witness testified that he would expect the analysis to be practically the same; that he could not explain the difference; could not tell from the analysis how old the beer was.

JOHN A. WELCH and JOHN PULLING were sworn for the People, testified that they accompanied Mr. Bean on his visit to the brewery and gave testimony tending to corroborate Mr. Bean's statements.

9 LUTHER D. LITTLE, recalled by Mr. REECE:

Q. Mr. Little, it appears from the testimony here in the room where the vats were located at the Eberle Brewing Co. plant on the 11th of September that the room containing the vats of fluids, samples of which you analyzed was full of gas, a very strong oder of gas; do you know what that would come from?

A. In the process of fermentation of the malt extract which contains sugar and soluble starch, which they ferment into alcohol to make beer, and the sugar in the process of fermentation is converted both into alcohol and carbon dioxide. Carbon dioxide is a heavy gas and that would come off from the fermenting vat. There must be some fermentation to make that gas. There would be alcohol present if it is fermentation of sugar which is always present naturally in malt extract.

Cross-examination:

Q. That process would be gone through with in the manufacture of temperance beer?

A. Yes, in the primary operation.

Q. When they get the completed product, however, they would take the alcohol all out of it?

A. If it was kept at a certain temperature it would become dealcoholized, as we term it; remove all of the alcohol. As a matter of fact, where they brew temperance beer, you will find the same process being gone through with in the primary stages. There would be foam on the top of the vats. Temperance beers are virtually the remains of malt extracts. In other words, if it goes through fermentation, part of it is fermented into alcohol and carbon dioxide, and after that is completed they dealcoholize it. We couldn't tell from the sample of temperance beer whether it was plain malt extract, or whether it had been dealcoholized. Alcohols are of various kinds.

Alcohol in the process of fermentation is what is called grain
10 alcohol, spirits of wine, because that is where it was originally obtained from, which is the result of fermentation of the sugar. You have alcohol wherever you have yeast in the fermentation. You have alcohol in the rising of bread. I shouldn't imagine that the stuff in the vats would be very pleasant to drink. It is simply in a certain stage of manufacture.

FRANK A. PALMER, Deputy County Clerk, was sworn for the People and gave evidence of the preamble and resolution adopted April 13th 1909 by the board of supervisors required by law to give effect to the local option law within the county of Jackson; the minutes and records of the proceedings of the board of supervisors being offered and received in evidence.

WILLIAM F. HEINS, sworn for the People, examined by Mr. REECE, testified:

I am working at the American Gear. About four years ago I worked for the Eberle Brewing Co., up until about four weeks ago.

Was working an a delivery wagon. Before the first of May, last year they made beer over there at the brewery, lager beer, as near as I could tell. I am not in the habit of drinking it frequently. I know what lager beer tastes like and what it looks like. I was not familiar with the inside of the brewery before the first of May, 1909. Didn't go in there very often. After the first of May I went in there some. There was some changes made there after the first of May, 1909. Some of the machinery was changed for making temperance beer. They had it up stairs first. I never went down cellar after they took it down there. I don't know whether there was any change made in that part of the machinery for making lager beer. I didn't go down cellar to see. The change for
11 making temperance beer was new machinery. There was none of the old machinery taken out to my knowledge. I don't know whether the old machinery that is there was still used after the first of May. I never was there when they used the new machinery for making temperance beer. I never saw the new machinery working. They got new machinery there. The old machinery was still there. They didn't take any of it out. I don't know whether the old machinery was all operated or not. I saw beer there after the first of May. I was there the day the sheriff was there. He took some samples off my wagon. I don't know whether it was beer or not. I didn't drink very much of it to find out how it differed from the ordinary lager beer that we made before the first of May. I drank a little once in a while. What was made after the first of May didn't taste any like beer to me. None of it that I had. It didn't seem quite so strong and had a different taste. There has been no place in the brewery where the men helped themselves since it went dry, since the first of May. Before that there was such a place on the first floor in the northwest corner in the brewery. After the first of May it was shut up. There was nothing to drink there. After the first of May, 1909, I guess there were six men employed over there at the brewery. Before the first of May there were 12 or 13. After the first of May, 1909 you couldn't get in any place but the bottling works, unless you went into the engine room.

The COURT: They want to know what part of the brewery was closed down after the first of May.

A. The part where they made beer. They call it the brewery, that's all I know about it, where they keep the malt, hops and everything. I didn't try to go in there any place to know whether it was closed or not. I had different kinds of stuff on my wagon that day; temperance beer, sweet cider, and what we call near beer and some lager beer. I couldn't tell the difference between lager beer and temperance beer by looking at it. I could by tasting of
12 it. I couldn't tell you when the lager beer was bottled. I think it is kept for three or four months anyway after it has reached the completed stage before it is bottled. I couldn't tell just how long it is kept. I never handled it to know. It takes three or four months before it is good to use. I don't know how long the beer had been in the vats that was there on the 11th of September.

Q. If the beer was still in the vats, it wasn't a completed product was it, for use?

A. No, sir; it wasn't.

Cross-examination:

As far as I know lager beer may be kept for a long time before it is bottled. I don't know how much beer they had there on the first of May, 1909. I know there was some changes made there and some new machinery put in. They commenced to make what they called temperance beer. After the first day of May, 1909, there was no lager beer made there to my knowledge.

People rest.

Defense.

CARL EBERLE, sworn for the defendants, examined by Mr. Price, testified that he lived in Jackson 28 years and was a stockholder of the Eberle Brewing Co. Had been in charge of the brewery ever since it was built; am familiar with the process of brewing beer, and have been for the last 45 years. Had charge of the brewing of the beer while the brewery was running. On the first day of May, 1909 when the local option law went into effect we had on hand in the neighborhood of 1600 or 1700 barrels of beer, worth five dollars a barrel. After beer is made and stored in large casks or barrels it will deteriorate and become worthless if nothing is done to it. We had the beer in large casks. In order to keep it from becoming worthless we had to add new beer to it to keep it alive. We made an effort to dispose of the beer before it reached the stage where we had to renew it by the introduction of new beer, but we were not able to get rid of it. If new beer had not been introduced into it, it would have been worthless, and we would have suffered the loss of it. In order to keep it alive and prevent its deterioration we had to make a brew once in a while to get some new beer to add to the old beer, otherwise the goods would spoil, if we hadn't done so, and wouldn't have been marketable. We couldn't have sold the goods unless we had done that. All the new brew that we made was made use of in that way merely to keep alive the old beer that we had on hand. We didn't use the new brew for any other purpose.

13 When Mr. Bean came there on the 11th day of September, 1909 there were six vats that had beer in them. The other vats were empty. Part of it was new beer to keep alive the old beer and part of it was temperance beer. We have been engaged in making temperance beer since the first of May, 1909. We got new machinery for that purpose. In the manufacture of temperance beer we make use of the same vats and the same old machinery that we made use of in the making of lager beer. By the aid of this new machinery when the product is completed it is what is called temperance beer, non-alcoholic beer, non-alcoholic and non-intoxicating. This place that has been called the cooler is what we call

the racking room. There was a large amount of old beer in the basement that Mr. Bean did not see at all.

The COURT: I understood you to say in the vats part of it was new lager beer and part of it new temperance beer. The new lager beer to keep the other that was on hand on the first of May from spoiling?

A. Yes, sir. This new lager beer at the stage to which we brought it and made use of it to keep the old beer from spoiling was not in such condition that you could make use of it to drink it at all. You couldn't drink it at the time we introduced it to the old beer. It had not been brought to that stage.

Cross-examination.

By Mr. REECE:

I was president of the Brewing Company from the first of May until the 11th of September and during that time Mr. Carroll was a stockholder and vice-president and treasurer. He was not in the brewery every day. He was in the office. He was at the office practically ever- day. He was not in the brewery frequently. The office is on the opposite corner from the brewery. He knew what was going on there and what was being done. We did, between the first day of May and the 11th of September, make lager beer there. The brewery was equipped for making lager beer the same as it was before the first of May. This new lager beer which we made to add to the old beer contained alcohol. We had 16 or 1700 barrels of beer on hand on the first of May. We didn't have all of that amount in the basement on the 11th of September when the sheriff was over there.

Q. The purpose of making new lager beer and adding it to the old beer, that was done for the purpose of keeping the old beer in good condition and marketable?

A. Yes, sir.

14 Redirect examination:

None of the new beer that we made was used for any purpose except to put into the old beer to keep it from spoiling. We didn't make any new lager beer and dispose of it as new lager beer. We used it all for the purpose of keeping the old beer alive. All the new beer was made for that purpose, just to save the old goods, the old beer until such time as we could get rid of it.

Recross-examination:

There was lager beer in two of the vats when the sheriff was there. While it is in the vats it isn't completed; you can't use it. It is in the process of brewing, making of it. It is fermenting at that time.

Testimony closed.

Defendant's attorney here made a motion to direct a verdict in said cause, which was in writing and is as follows:

Come now the said defendants at the close of testimony in said

cause, and move the court to direct a verdict of not guilty in said cause, for the following reasons, to-wit:

First. Because Act No. 207 of the Public Acts of the State of Michigan for the year 1889, as amended, upon which said information is based, and with the violation of which these defendants are charged, is repugnant to the Constitution of the United States and the constitution of this state, and therefore void.

15 Second. Because said act as amended is in conflict with paragraph 3, section 8 of artic-e 1 of the Constitution of the United States, giving to Congress the power to regulate commerce.

Third. Because said act as amended is repugnant to and in conflict with section 2, article 4 of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Fourth. Because said act as amended is repugnant to and violates the 14th amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; and also violates section 32, article 6 of the constitution of this state.

Fifth. Because said act as amended is repugnant to and in violation of the 4th amendment of the Constitution of the United States, and section 26 of article 6 of the constitution of this state, concerning unreasonable searches and seizures, and forbidding the issuance of search warrants except upon probable cause supported by oath or affirmation.

Sixth. Because it appears from the evidence that whatever brewed, malt or intoxicating liquor or beer was manufactured by the defendants or the Eberle Brewing Company after the first day of May, 1909, was manufactured for the purpose of preserving beer which had been manufactured and had been in existence before the first day of May, 1909, and to prevent the loss of such property,

16 and was used for that purpose, and the said defendants had the right to protect their property and prevent its loss in such manner.

RICHARD PRICE,
Attorney for Defendants.

The COURT: It seems to me the first five of those reasons are the same that were passed upon by the court at the commencement of the trial. The sixth reason is added to those reasons and is also embodied in one of the requests to charge which counsel has submitted. As to the sixth I have heard no argument, and I am not passing upon that motion without having heard argument upon it. But I will deny the motion, and so far as that sixth reason is involved in the request to charge, I will hear the argument of counsel upon it in that connection, that is, in connection with the requests to charge. I prefer to have it argued so that that point isn't finally passed upon in overruling the other five reasons of the motion. I

consider it in connection with the requests to charge which embodies the same proposition.

Mr. PRICE: Give me an exception to the ruling of the court denying the motion.

Arguments were here addressed to the court by defendants' attorney in favor of the sixth reason of the motion and the third request to charge.

Defendants' requests to charge were as follows:

First. You are instructed to render a verdict of not guilty in said cause, for the reason that the law upon which the information in said cause is based, is unconstitutional and void, for the reasons already set out in the motion to quash, and to direct a verdict in said cause.

(Refused, J. A. P.)

17 Second. It appearing from the evidence in said cause that no more was done by said defendants than was necessary to protect their property from spoiling, and to prevent the loss of it, and that any intoxicating liquor or beer made by them after the first day of May, 1909, was made and used for the purpose of preserving the beer on hand before the first of May, 1909, and to prevent its loss, I instruct you that the defendants had the right thus to protect their property, and you should return a verdict of not guilty.

(Refused, J. A. P.)

Third. (This instruction to be given if the first and second are refused.) If you believe from the evidence that whatever malt, brewed or intoxicating liquor was manufactured by the defendants during the time alleged in the information in this cause was manufactured by them for the purpose of introducing it into the beer that was already on hand before the first day of May, 1909, to preserve it from spoiling, and was used for that purpose, then I charge you that the defendants would not be guilty of the charge made against them in the information upon which this trial had been had, and you should return a verdict of not guilty.

(Refused, J. A. P.)

RICHARD PRICE,
Attorney for Defendants.

Charge of the Court in Full.

Gentlemen of the Jury:

The respondents are on trial, charged in the third count of the information, which the prosecutor elects as the charge upon which the case should be disposed of, with the manufacture of brewed liquors, commonly called beer, lager beer. No question is made that the resolution of the board of supervisors prohibiting the manufacture, sale, keeping for sale, giving away or furnishing of vinous, malt, brewed, fermented, spirituous or intoxicating liquors has been adopted in Jackson County. There is no claim of any qualifying on the part of the respondents for the sale of liquor or beer in Jackson or its manufacture.

The testimony in this case is not disputed. One of the defendants has gone upon the stand and admits that beer was manufactured after the first day of May when the local option law had gone into effect, but says it was manufactured to mingle with a large quantity of beer which had been made or manufactured and was on the premises before May 1st, 1909, when the local option law took effect in this county and that the purpose of manufacturing new beer which was indulged in from time to time was to preserve the old beer. I suppose to renew it or keep it up to quality or in shape for use, as otherwise according to Mr. Eberle's testimony it would have been spoiled.

Now, then, gentlemen, I am asked to instruct you that this manufacture of new beer from time to time for that purpose is not contary to the provision of the local option law, and I am asked to say to you that the testimony is undisputed that the only purpose of the manufacture was to keep the old product in marketable condition, or in a proper condition to preserve it, fit for consumption or for market.

18 Where testimony is undisputed, especially where the defendants state and the defendants testify to such facts as have been testified to her by Mr. Eberle, it imposes a duty upon the Court different from the one imposed in cases where the facts are in dispute, and almost practically makes it necessary for the court to dispose of the case as a matter of law.

Questions of constitutionality have been raised here which this court, being a subordinate court, not a court of final jurisdiction, feels it would not be warranted in considering or passing upon; even if my own individual opinion as a lawyer were to coincide with what is contended for by the defendants' counsel, I would still think I wasn't doing my duty in an official capacity to adopt that view and instruct the jury in accordance with it for one reason, if I were so to do, there would be no way of reviewing my action and getting an expression from the highest tribunal in the state upon the point. Constitutional questions should not be passed upon by subordinate courts if there is any sort of doubt about them whatever. They should be left to the highest tribunal, and the Supreme Court will only get an opportunity to pass upon this case and upon the points raised by my instructing you otherwise than as requested, so that in case of conviction the Supreme Court may be heard upon these questions.

Now, gentlemen, this case arises under what is known as the local option law. There is a general liquor law providing certain regulations for the conduct of bars and saloons and imposing a tax that is often referred to as the license law. That is the general law of the state. In most counties where the local option law so-called is adopted by vote of the people and according to the forms prescribed by a statute, the general state law becomes suspended and the local option statute takes effect. This question was voted upon in Jackson County the first Monday in April, 1909; it was adopted; the

19 resolution of the Supervisors was passed April 13th. The law would take effect on the first day of May. Between the date

of its adoption, April 13th, and the first day of May, when it should take effect, parties holding beer, liquor, wine or any of these prohibited beverages which they desired to get rid of had the opportunity to get rid of between April 14th and May first.

Now, the statute says it shall be unlawful for any person, directly or indirectly, himself or by his clerk, agent or employé, to manufacture, sell, keep for sale, give away or furnish any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, etc. That language does not say manufacture to sell, or manufacture to store, or manufacture to keep previously manufactured beer in good condition until such time as the people should change their mind and vote otherwise. It doesn't permit sales in a county after it takes effect. It seems to me the only thing that a brewer could do was to get rid of his stuff by selling it before May first. I don't think he could lawfully sell it afterwards within this county.

Counsel for the defendants, and perhaps with some reason—I am not going to say there is no reason in what he says—it may be a serious question, but for the purpose of this case I do not regard it as a serious question. He says that manufacture means manufacture to sell, and this was manufactured to preserve other products already completed but which wouldn't keep except as restoratives were applied occasionally. But I am not able to take that view and I don't think I ought to take that view. I think it is the design of the statute to put an end in counties where it is properly adopted to all of these various things; put an end to manufacturing, put an end to selling, and put an end to keeping for sale. If I were to adopt the view defendants' counsel takes, I should feel as if I had to import into the statute words that the legislature has not put there, or have to say that in order to be a violation the party must not only be guilty of manufacturing but that the charge should be that he manufactured to sell, bring in that construction a motive, adding to the act of manufacturing the motive to sell. I do not think the court is warranted in saying that. I do not think the court is warranted in changing the plain meaning of the statute by any forced construction.

Now, gentlemen, I have stated to you that the testimony in the case is not in dispute. The testimony given by the people is not in dispute unless there may be some slight differences between what some of the witnesses have said as to occurrences at the time of the seizure and Mr. Eberle's recollection of it; nothing material. And the defendant admits that after the first of May the manufacture continued with the knowledge of the managers of the corporation and its officials, which include Mr. Eberle himself and Mr. Carroll.

It might perhaps be a rather delicate thing for the court to absolutely direct a verdict in a criminal case, even where the testimony is undisputed. Since the credibility of the witnesses is for the jury, I will hardly do that. I shall submit the question to you, gentlemen, for your verdict. I instruct you, gentlemen, if you believe the testimony in this case that the factory or brewery was run after May first, for the purpose of manufacturing lager beer, that these defendants were cognizant of it, were in control of it, the managers of it,

officers of the Eberle Brewing Company, directing its policy, knowing what was done, seeing what was done, permitting what was done, facilitating what was done, that your verdict must be guilty. The law prohibits the manufacture after the first of May, no matter for what purpose it is manufactured or what the reason is. It is absolute prohibition.

21 Now, gentlemen, in all criminal cases, the burden of proof rests upon the people to make out their case to the satisfaction of the jury and beyond a reasonable doubt. That burden remains upon and abides with the people throughout the case. Defendants are always presumed innocent until the contrary is shown by evidence which convinces the jury of the fact of guilt beyond a reasonable doubt.

The jury are the sole judges of the credibility of witnesses and of the probative force of the testimony.

Now, I submit this case to you to say whether the evidence that has been given here, including the evidence of Mr. Eberle, is true, whether you believe it is true beyond a reasonable doubt. If you believe it is true, that these gentlem-n as officials of the Eberle Brewing Company, a corporation, were manufacturing beer at the time alleged in the information—I haven't the information here—at any time between the first of May, 1909, and the 11th day of September, 1909, then you should find the respondents guilty as charged; if you have a reasonable doubt, it will be your duty to acquit.

Swear an officer.

Mr. PRICE: I take an exception to the refusal to give the first, second and third requests of the defendants' charge.

And the said jury, under the charge and instructions aforesaid, returned from the bar of the Court under the charge of William M. Horsman, an officer of the Court duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time return into the Court and say upon their oaths that the said respondents are guilty in manner and form, as the said people did in their information in said cause allege.

And because the foregoing matters and things do not appear of record in said cause, I, the Circuit Judge aforesaid, in pursuance of the statute and rules in such case made and provided, have settled this bill of exceptions, and do certify that the same contains the substance of all the testimony given upon the trial of said cause and the rulings made and exceptions taken therein, and so far as the said testimony is set out by question and answer, I have thought it necessary to a full understanding of the same, and of the questions of law raised by the assignments of error hereto attached and accompanying this bill of exceptions.

Dated May 16th, 1910.

JAMES A. PARKINSON,
Circuit Judge.

We consent to the settlement of the foregoing bill of exceptions as above prepared and waive notice of the settling and signing of the same.

ALBERT O. REECE,
Prosecuting Attorney.
RICHARD PRICE,
Attorney for Defendants.

22 STATE OF MICHIGAN:

Circuit Court for the County of Jackson.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
CARL EBERLE and STEPHEN H. CARROLL, Respondents.

Assignments of Error.

Come now the said respondents, by Richard Price, their attorney, and say that in the record, proceedings and charge of the Court in said cause there was manifest error in this, to-wit:

First. The Court erred in overruling defendants' motion to quash the information in said cause and discharge the defendants, for the reasons set forth in said motion as contained in the bill of exceptions herein.

Second. The Court erred in overruling and refusing to grant defendants' motion to direct a verdict at the close of the testimony in said cause, for the reasons set forth in such motion as follows:

23 First, because Act No. 207 of the Public Acts of the State of Michigan for the year 1889, as amended, upon which said information is based, and with the violation of which these defendants are charged, is repugnant to the Constitution of the United States and the constitution of this state, and therefore void.

Second, because said act, as amended, is in conflict with paragraph 3, Section 8 of Article I. of the Constitution of the United States, giving to Congress the power to regulate commerce.

Third, because said act, as amended, is repugnant to and in conflict with Section 2, Article IV. of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Fourth, because said act, as amended, is repugnant to and violates the fourteenth amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; and also violates Section 32, Article VI. of the constitution of this state.

Fifth, because said act, as amended, is repugnant to and in violation of the fourth amendment of the Constitution of the United States, and Section 26 of Article VI. of the constitution of this state, concerning unreasonable searches and seizures, and forbidding the

issuance of search warrants except upon probable cause supported by oath or affirmation.

24 Sixth, because it appears from the evidence that whatever brewed, malt or intoxicating liquor or beer was manufactured by the defendants or the Eberle Brewing Company after the first day of May 1909, was manufactured for the purpose of preserving beer which had been manufactured and had been in existence before the first day of May 1909, and to prevent the loss of such property, and was used for that purpose, and the said defendants had the right to protect their property and prevent its loss in such manner.

Third. The Court erred in refusing to give defendants' first request to charge.

Fourth. The Court erred in refusing to give defendants' second request to charge.

Fifth. The Court erred in refusing to give defendants' third request to charge.

Sixth. The Court erred in charging the jury as follows: "This question was voted upon in Jackson county the first Monday in April, 1909; it was adopted; the resolution of the Supervisors was passed April 13th. The law would take effect on the first day of May. Between the date of its adoption, April 13th, and the first day of May, when it should take effect, parties holding beer, liquor, wine or any of those prohibited beverages which they desired to get rid of had the opportunity to get rid of between April 14th and May 1st."

Seventh. The Court erred in charging the jury as follows: "Now, the statute says it shall be unlawful for any person, directly or indirectly, himself or by his clerk, agent or employè, to manufacture, sell, keep for sale, give away or furnish any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, etc. That language does not say manufacture to sell, or manufacture to store, or

25 manufacture to keep previously manufactured beer in good condition until such time as the people should change their mind and vote otherwise. It doesn't permit sales in a county after it takes effect. It seems to me the only thing that a brewer could do was to get rid of his stuff by selling it before May 1st. I don't think he could lawfully sell it afterwards within this county."

Eighth. The Circuit Court erred in charging the jury as follows: "Counsel for defendants, and perhaps with some reason—I am not going to say there is no reason in what he says—it may be a serious question, but for the purposes of this case I do not regard it as a serious question. He says that manufacture means manufacture to sell, and this was manufactured to preserve other products already completed but which wouldn't keep except as restoratives were applied occasionally. But I am not able to take that view, and I don't think I ought to take that view. I think it is the design of the statute to put an end in counties where it is properly adopted to all of these various things; put an end to manufacturing, put an end to selling, and put an end to keeping for sale."

Ninth. The Circuit Judge erred in charging the jury as follows: "The testimony given by the People is not in dispute unless there may be some slight differences between what some of the witnesses

have said as to occurrences at the time of the seizure and Mr. Eberle's recollection of it; nothing material. And the defendant admits that after the first of May the manufacture continued with the knowledge of the managers of the corporation and its officials, which include Mr. Eberle himself and Mr. Carroll."

Tenth. The Circuit Judge erred in instructing the jury as follows: "I instruct you, gentlemen, if you believe the testimony in this case that the factory or brewery was run after May 1st
26 for the purpose of manufacturing lager beer, that these defendants were cognizant of it, were in control of it, the managers of it, officers of the Eberle Brewing Company, directing its policy, knowing what was done, seeing what was done, permitting what was done, facilitating what was done, that your verdict must be guilty. That law prohibits the manufacture after the first of May, no matter for what purpose it is manufactured or what the reason is. It is absolute prohibition."

Eleventh. The Circuit Judge erred in charging the jury as follows: "I submit this case to you to say whether the evidence that has been given here, including the evidence of Mr. Eberle, is true, whether you believe it is true beyond a reasonable doubt. If you believe it is true, that these gentlemen as officials of the Eberle Brewing Company, a corporation, were manufacturing beer at the time alleged in the information—I haven't the information here—at any time between the first of May, 1909, and the 11th day of September, 1909, then you should find the respondents guilty as charged; if you have a reasonable doubt, it will be your duty to acquit."

Dated May 10th, 1910.

RICHARD PRICE,
Attorney for Defendants.

27 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Twentieth Day of October, in the Year of our Lord one thousand nine hundred and ten.

Present:

The Honorable Frank A. Hooker, Joseph B. Moore, Aaron V. McAlvay, Flavius L. Brooke, Charles A. Blair, Associate Justices.

No. 24067.

THE PEOPLE
vs.
CARL EBERLE et al.

This cause coming on to be heard is argued in part.

28 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Twenty-first day of October, in the Year of our Lord one thousand nine hundred and ten.

Present:

The Honorable Frank A. Hooker, Joseph B. Moore, Aaron V. McAlvay, Flavius L. Brooke, Charles A. Blair, Associate Justices.

No. 24067.

THE PEOPLE
vs.
CARL EBERLE et al.

The argument heretofore commenced herein is concluded and the cause duly submitted.

29 STATE OF MICHIGAN:

In the Supreme Court.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
CARL EBERLE and STEPHEN H. CARROLL.

It is hereby stipulated and agreed by and between Nathan E. Bailey, Prosecuting Attorney and Franz C. Kuhn Attorney General, and Richard Price, Attorney for the respondents, that one of the Justice- of the Supreme Court who did not listen to the arguments in this cause, may, nevertheless, participate in the decision, in the place of Justice Hooker, deceased.

Dated this 19th day of August, 1911.

NATHAN E. BAILEY,
Pros. Att'y.
RICHARD PRICE,
Att'y for the Respondents.

Approved:

HENRY E. CHASE,
Deputy Attorney General.

Endorsed: Filed August 21, 1911. Chas. C. Hopkins, Clerk.

30 STATE OF MICHIGAN,
Supreme Court:

Filed Dec. 8, 1911.

THE PEOPLE
vs.
CARL EBERLE and STEPHEN H. CARROLL, Respondents.

Before Stone, J.; Moore, McAlvay, Brooke, Blair, JJ.

McALVAY, J.:

Respondents were convicted under the Local Option Law, adopted and in force in Jackson County, upon a charge that they "did manufacture brewed, malt, and intoxicating liquors, to-wit: beer", contrary to the provisions of said Law. The case is before this court upon exceptions before sentence.

The facts are not in dispute. No question is raised but that the Local Option Law prohibiting, among other things, the manufacture of brewed malt and intoxicating liquors was at the time charged in force in said County. It is admitted that respondents did manufacture the beer in question.

The defense is founded upon the propositions:

1. That the law on account of certain of its provisions is unconstitutional:

2. That such manufacture was not unlawful, because done for the sole purpose of preserving a large quantity of beer, to-wit: 1,700 barrels, which they had lawfully manufactured and had on hand at the time such law went into effect.

In order to understand the second contention properly some of the undisputed facts must be stated.

Defendants were stockholders and officers of the Eberle Brewing Company, a Michigan corporation, which owned a brewing plant at Jackson, and had been for several years engaged in the
31 manufacture of lager beer. When the Local Law went into effect in Jackson County, on May 1st, 1909, the company had on hand about 1,700 barrels of beer, which they had been unable to sell. It appears that this beer would have become worthless and unmarketable, if a new brew were not made and introduced into it occasionally, to keep it alive. The new beer was made and used only for this purpose. It was not then old enough to be in a fit condition to drink. The company after the first of May 1909, was manufacturing a temperance non-alcoholic beer, for which some new machinery had been purchased, to be used in connection with the same vats and machinery theretofore used in the manufacture of large beer. On Sept. 11, 1909 there was a large quantity of this old beer on hand in the basement and storerooms of the brewery. The sheriff and his deputies on that date found six vats full of what was supposed to be beer in the process of fermentation. Two of these vats were filled with new lager beer, and three were filled with temperance beer. Samples of all kinds were taken for analysis.

The temperance beer was found to contain no alcohol. The new and the old lager beer contained the percentage of alcohol usually found in lager beer.

Defendants requested the court to charge in accordance with the contention above stated, that from the proof in the case it appeared that no beer had been manufactured after May 1, 1909, by defendants except to preserve and protect their property, and was used only for that purpose, and defendants were within their rights and not guilty; and if such request was not given, then to charge that if the jury so found the facts to be, then the defendants would not be guilty as charged, and a verdict of not guilty should be returned.

These requests were refused, and the court charged that under the law then in force the manufacture of beer, "no matter for what purpose it is manufactured, or what the reason is", was
32 strictly prohibited, and if the jury found beyond a reasonable doubt that beer had been manufactured as charged then respondents should be found guilty, otherwise they should be acquitted. Errors are assigned upon such rulings.

The constitutionality of the law is attacked upon several grounds:
(*a*) That it is in conflict with par. 3, Sec. 8 of Article 1, of the Constitution of the United States relative to the regulation of Commerce.

(*b*) That it is repugnant to Sec. 2, Art. IV of said Constitution, relative to the privileges of citizens of different states.

(*3*) That it violates the 14th Amendment of the same, and also Sec. 32 Article VI of the constitution of this state.

(*d*) That it violates the Constitution of the United States, and of this State relative to unreasonable searches and seizures and the issuance of search warrants.

The question of the constitutionality of the original Act, being Act 207 P. A. of 1889, of which the law in question is
33 amendatory, has been considered by this court, and the law held to be a valid and constitutional exercise of the legislative power.

Friesner vs. Charlotte, 91 Mich. 504.
Feek vs. Township Board, 91 Mich. 393.

Similar statutes have been held to be constitutional in other states.

23 Cyc. 78, and cases cited in note 59 et seq.

It is not contended that this law was not duly and regularly adopted according to its requirements, nor that the Legislature might not enact a constitutional local option law. Claims of unconstitutionality are based upon the provisions of certain sections of this law, the objectionable portions of which as set forth and relied upon in respondent's brief are as follows:

"Section 1 of said act provides, "It shall be unlawful for any person, directly or indirectly, himself or by his clerk, agent or employee, to manufacture, sell, keep for sale, give away or furnish any vinous, malt, brewed, fermented, spiritous or intoxicating liquors, or any mixed liquor or beverages, any part of which is intox-

icating or keep a saloon or any other place where any such liquors are manufactured sold, stored for sale, given away or furnished in any county of this state on and after the first day of May next following after the adoption by the Board of Supervisors of such county of a resolution prohibiting the same, as provided by section thirteen of act number two hundred seven of the public acts of eighteen hundred eighty-nine as amended, so long as said resolution remains unrepealed Provided, however That the provisions of this section shall not apply to druggists, or registered pharmacists, selling any such liquors under and in compliance with the restrictions and requirements imposed upon them by the general laws of this state and sections twenty-five and twenty-six of this act as amended."

Section 2 of the act provides, in substance, for the suspension of the general laws of the state regulating the business of manufacturing and selling liquor, etc., in the territory and municipalities within the limits of any county where local option is adopted. "Provided however, that all sales of liquors by druggists or registered pharmacists in such counties shall be under the restrictions and requirements imposed upon them by the general laws of this state and this act, as amended."

Sections 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, and 14 contain provisions for ascertaining the will of the people and declaring the result of the election in counties where local option is adopted.

Section 15 is as follows: "Sec. 15. The prohibitory provisions of this act shall take effect and have full force within such county of this state on and after the first day of May, immediately following the adoption by the Board of Supervisors of such
34 county of the resolution ordering such prohibition and upon publication of the notice of the adoption of such resolution: Provided, however, That nothing in this act shall be so construed as to prohibit the sale of wine for sacramental purposes, nor shall anything herein contained prohibit druggists or registered pharmacists from selling or furnishing pure alcohol for medicinal, art, scientific and mechanical purposes, nor prohibit the sale of wine or cider from home grown fruit in quantities of not less than five gallons, nor shall the provisions of this act be construed to prohibit the manufacture of wine or cider, nor shall the provisions of this act be construed to prohibit the sale at whole-sale of wine or cider manufactured in said county to parties who reside outside of said county."

Sections 25 and 26 provide that druggists "shall be permitted to sell such vinous, malt, brewed, fermented, spiritous and intoxicating liquors for medicinal purposes, but only on the written prescription of a regular practicing physician," and also provides that such druggists "shall be permitted to sell pure alcohol or any vinous, fermented or spiritous liquors for art, chemical, scientific or mechanical purposes, but only on the written application of the purchaser, stating the purpose for which such liquors are purchased, which application shall be subscribed and sworn to by the person making such purchase."

"The general laws of the state referred to above being Act 313

of the Public Acts of 1887 provide in Section 3 that the provisions of the act shall not apply to druggists who sell liquors for chemical, scientific, medicinal, mechanical or sacramental purposes only, and in strict compliance with the law, and then contains certain provisions in regard to sales to minors, etc., and the giving of a bond."

From respondent's argument and conclusions drawn from a consideration of this statute, we may state briefly their claims against its constitutionality, as follows:

1. That it deprives citizens of property without due process of law:

2. That it discriminates against citizens and products of other states, and is an interference with interstate commerce.

3. That it discriminates against and abridges the privileges and immunities of citizens of this State denying them the equal protection of the laws, and the privileges and immunities of the citizens of the other states.

It is well settled that the state in the exercise of the police power may regulate or prohibit the manufacture and sale of spiritous and intoxicating liquors within its territory.

People vs. Hawley 3 Mich. 330.
People vs. Gallagher 4 Mich. 244.

35 If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by incidental inconvenience which individuals or corporations may suffer."

Beer Co. vs. Mass., 97 U. S., 25.

This is now the accepted doctrine.
Foster vs. Kansas, 112 U. S., 201-206.

The police power of the state is, however subject to the limitations of the Federal Constitution.

The law under consideration is a prohibitory law limited in this case to the territory of one county; but the same rules of law must be applied in its construction as would be applied were it State wide in its application. When this law went into effect the Brewing Company of which respondents were officers and managers was possessed of property which could not be operated for the purposes of making lager beer within the county, or sold without great loss, nor could the valuable product be disposed of. Naturally a great loss and depreciation in value of the property occurred. However much such a state of facts may appeal to us, the fact remains that the question as to whether this condition is not incidental to the business engaged in must be determined as a question of law. We find that the great weight of the authorities holds that a prohibitory law which will so operate is not unconstitutional.

"Although it may deprive persons of the right to pursue a business previously lawful, and may have the effect of diminishing the value of property owned by them, and specially adapted to the

continuance of the business, it does not for that reason amount to a deprivation of their property or liberty without due process of law within the meaning of the constitution."

36 Black on Intox. Liquors, Par. 37.
Mugler vs. Kansas, 123 U. S., 628.
Kidd vs. Pearson, 128 U. S., 1.

Reference is had to the learned opinion in Mugler vs. Kansas, supra, written by Mr. Justice Harlan, where the leading cases are cited and discussed with reference to the provisions of the Kansas statute, and the exceptions therein contained, which provisions and exceptions are identical with our law, with one exception which will be discussed later.

The authorities last above cited also dispose of respondents' second contention that under the facts in the instant case the court should have directed a verdict of not guilty for the reason that the manufacture of this beer was for the purpose of preservation of property only. The clear legislative intent expressed in this law was the prohibition of the manufacture or sale of the products therein described (subject to certain express exceptions) within the territory of the county adopting it. The only basis upon which such contention can be made is because of the claim that its denial would operate to diminish in value and destroy property without authority of law, to the damage of respondents.

From this it may be reasonably inferred that a liability upon the municipality would result.

This argument is not elaborated by respondents, but it may be assumed that the principle of remuneration as in the taking of private property for a public use is referred to.

The distinction between the exercise of the right of eminent domain in taking private property for a public use, and the injury, damage and loss to property, incidental to the exercise of the police power of the State in the promotion of the public welfare is well defined.

Beer Co. vs. Mass., supra.
Mugler vs. Kansas, supra.

In the latter case, the United States Supreme Court said

37 "these principles have no application to the case under consideration. The question in Pumpelly vs. Green Bay Company, (13 Wall. 166) arose under the State's power of eminent domain: while the question now before us arises under what are strictly the police powers of the State, exerted for the protection of health, morals and safety of the people" * * * "As already stated the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for the purposes that are declared by valid legislation to be injurious to the health, morals, or safety of the community cannot in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his

property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one for certain forbidden purposes is prejudicial to the public interests."

There remains a further objection to be considered. This local option law exempts from its prohibition, the sale of wine and cider from home grown fruit in quantities of not less than five gallons, and also the manufacture of wine and cider in the county, and the sale thereof at wholesale to parties who reside outside of the county.

It is claimed that in this respect the statute is an attempt to restrict commerce and to discriminate against the citizens and products of other states.

Our construction of these exemptions from the operation of this prohibitory law relative to wine and cider is that in each instance reference is had to wine and cider manufactured from home grown fruit. It is so expressly stated relative to the sale in quantities not less than five gallons, and from the context it is clear that the unrestricted manufacture in the county and the unrestricted
38 sale at wholesale to parties who reside outside of the county, apply only to the product of home grown fruit.

In discussing the discrimination against the products of other states contained in statutes similar to our local option law, Mr. Black in his valuable text book has said:

"In several states, at various times, laws have been enacted prohibiting the sale of wine made from fruits grown outside the particular state, but permitting the sale of that made from fruits grown within the states, and in some few cases provisions of this kind have been held valid. But the great preponderance of authority based upon repeated rulings of the Supreme Court of the United States, is to the effect that such discrimination against the products of other States is not defensible as a police regulation but is unconstitutional and void as an encroachment upon the exclusive power of congress to regulate foreign and interstate commerce."

Black on Intox. Liquors, Par. 44, and cases cited.
Weil vs. Calhoun, 25 Fed. R. 865, 873.
See also Kidd vs. Pearson, 128 U. S., 119.

It is admitted in the brief for the People that these provisions cannot be defended, because unconstitutional. We are satisfied that the weight of the authorities justifies such admission. The question is not whether a state may not lawfully prohibit or regulate the manufacture or sale of spiritous and intoxicating, vinous fermented and brewed liquors, and except a certain amount of some or all such products, to be used for certain purposes, but whether a state by exceptions may discriminate against the products and citizens of other states.

These exceptions relative to the manufacture and sale of cider and wine from homegrown fruit in this statute in our opinion being discriminatory, violate the provision of the Federal Constitution invoked. It remains to be considered to what extent this invalid portion affects the statute.

In discussing this question Judge Cooley says:

"A statute may contain some such provisions and yet the same act, having received the sanction of all branches of the legislature and being in the form of law, may contain other useful and
39 salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void, because they are associated in the same act, but not connected with or dependent on others which are unconstitutional.

Where therefore a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also unless all the provisions are connected, in subject matter depending on each other, operating together for the same purpose or otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other.

The point is not whether they are contained in the same section, for the distribution into sections is purely artificial: but whether they are essentially and inseparably connected in substance.

If when the unconstitutional part is stricken out, that which remains is complete in itself and capable of being executed wholly independent of that which was rejected it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule".

Cooley Const. Limit. (7th Ed.), pp. 246 and 247, notes and cases cited.

The original Local Option Law, so-called, was Act No. 207 P. A. 1889. It was in itself complete legislation, and remained intact as enacted as the law upon the subject in this state until the session of the legislature of 1899, and contained none of the provisions relative to the manufacture and sale of wine and cider from home grown fruits. At that session certain amendments were made by Act No. 183 P. A. 1899, to Section 15 herein above quoted and the first of these objectionable provisions was added as follows "nor prohibit the sale of wine or cider from home grown fruits in quantities not less than five gallons".

Section 15 was again amended by Act No. 170 P. A. 1903: which was an act limited to the amendment of this single section, and added the following; "nor shall the provisions of this act be construed to prohibit the sale at wholesale of wine or cider manufactured in said county to parties who reside outside of said county."

It is apparent that these amendments did not enter into legislative consideration until long after the original act was in active operation, so that a question sometimes considered by courts as to
40 whether the act would have passed without the objectionable clauses of Section 15 is not presented.

It remains only to apply the rule above stated to the instant case. It is clear that the general legislative purpose contained in the act may be accomplished with the objectionable provisions stricken out, leaving the act "complete in itself and capable of

being executed wholly independent of that which was rejected." This conclusion has already been intimated by this court in a former decision.

In re Wilson, 160 Mich., at p. 45.

The remaining objection that this act provides for unreasonable searches and seizures has received but little attention in the briefs or upon the oral argument. Our examination of those provisions satisfies us that the objection is not well taken.

The conviction is affirmed, and the court below directed to proceed to judgment upon the verdict.

Justice Stone by stipulation was substituted for the late Justice Hooker who sat in the case.

AARON V. McALVAY.
CHAS. A. BLAIR.
J. W. STONE.
FLAVIUS L. BROOKE.
JOSEPH B. MOORE.

Endorsed: Filed December 8th, 1911. Chas. C. Hopkins, Clerk.

41 At a session of the Supreme Court of the State of Michigan, held at the supreme court room, in the Capitol, in the City of Lansing, on the eighth day of December, in the year of our Lord one thousand nine hundred and eleven.

Present:

The Honorable Russell C. Ostrander, Chief Justice; Joseph H. Steere, Joseph B. Moore, Aaron V. McAlvay, Flavius L. Brooke, Charles A. Blair, John W. Stone, Associate Justices.

No. 24067.

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff,
vs.
CARL EBERLE and STEPHEN H. CARROLL, Defendants.

This cause having been brought to this Court upon exceptions from the Circuit Court for the County of Jackson, and the same and the records and proceedings therein having been seen and inspected and duly considered by the Court; Thereupon it is ordered that it be certified to said Circuit Court for the County of Jackson that there is no error in the rulings and proceedings therein, and that the said Circuit Court forthwith enter judgment upon the verdict.

42 Supreme Court of the State of Michigan.

THE PEOPLE OF THE STATE OF MICHIGAN
vs.
CARL EBERLE and STEPHEN H. CARROLL, Defendants.

To the Honorable Russell C. Ostrander, Chief Justice of the Supreme Court of the State of Michigan:

The above named defendants respectfully represent that a final adjudication and decision was rendered in said cause, by said court, on the eighth day of December, 1911, affirming the conviction of defendants in said cause, wherein is drawn in question the validity of a statute of said state on the ground of its being repugnant to the constitution of the United States, and such decision is in favor of the validity of said statute. Said defendants, therefore, feeling themselves aggrieved by such decision and adjudication, pray that a writ of error may be allowed to bring the same up for review before the Supreme Court of the United States, and that defendants may have such other relief as may be just in the premises.

Dated, December 11th, 1911.

CARL EBERLE,
STEPHEN H. CARROLL,
Per RICHARD PRICE, *Att'y.*

RICHARD PRICE,
Attorney for Defendants.

[Endorsed:] The People of the State of Mich. vs. Carl Eberle and Stephen H. Carroll, defendants. Petition. For allowance of writ of error from the Supreme Court of the United States. See 18 D. L. N., 498.

43 UNITED STATES OF AMERICA, *ss:*

To The People of the State of Michigan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Clerk of the Supreme Court of The State of Michigan wherein Carl Eberle and Stephen H. Carroll are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this twentieth day of December, in the year of our Lord one thousand nine hundred and eleven.

RUSSELL C. OSTRANDER,
Chief Justice of the Supreme Court of the State of Michigan.

Due service of a copy of the within citation is hereby accepted.
FRANZ C. KUHN, *Att'y Gen.,*
Attorney for Defendant in Error.

Dated Dec. 28, 1911.

44 Know all men by these presents, That we, Carl Eberle and Stephen H. Carroll, as principals, and Archibald J. Peek and Daniel C. Sauer, as sureties, are held and firmly bound unto The People of the State of Michigan in the full and just sum of Three Hundred dollars, to be paid to the said The People of the State of Michigan, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 11th day of December in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a session of the Supreme Court of the State of Michigan in a suit depending in said Court, between The People of the State of Michigan and said Carl Eberle and Stephen H. Carroll, defendants, a final judgment and decision was rendered against the said defendants and the said defendants, Carl Eberle and Stephen H. Carroll having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the decision in the aforesaid suit, and a citation directed to the said The People of the State of Michigan citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Carl Eberle and Stephen H. Carroll shall prosecute said writ to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CARL EBERLE [SEAL.]
STEPHEN H. CARROLL [SEAL.]
ARCHIBALD J. PEEK [SEAL.]
DANIEL C. SAUER.

Sealed and delivered in presence of—
BENJAMIN WILLIAMS.
RICHARD PRICE.

Approved by—
RUSSELL C. OSTRANDER,
Chief Justice of the Supreme Court of the State of Michigan.

December 23, 1911.

STATE OF MICHIGAN,
County of Jackson, ss:

Archibald J. Peek and Daniel C. Sauer, being sworn depose and say that they are the sureties on the within bond and each for himself says that he is worth the penalty of said bond in unincumbered

property not exempt from execution, under the laws of this State, over and above all just debts, claims and set-offs.

ARCHIBALD J. PEEK.
DANIEL C. SAUER.

Subscribed and sworn to before me this 16th day of December, 1911.

BENJAMIN WILLIAMS,
Notary Public.

My commission expires May 8, 1912.

STATE OF MICHIGAN:

Supreme Court.

The PEOPLE OF THE STATE OF MICHIGAN
vs.
CARL EBERLE and STEPHEN H. CARROLL, Defendants.

Assignment of Errors.

Come now the said defendants on the eleventh day of December, nineteen hundred and eleven, and with their petition that a writ of error be allowed from the Supreme Court of the United States to review the final adjudication and decision heretofore rendered in said cause on the eighth day of December, nineteen hundred and eleven, by the said Supreme Court of the State of Michigan, assign error in the record proceeding and decision of said Supreme Court of the State of Michigan as follows:

First. That the Supreme Court of the State of Michigan erred in holding and deciding that Act No. 207 of the Public Acts of the State of Michigan for the year 1889 is valid, the validity of said act having been denied and drawn in question by the defendants on the ground of its being repugnant to the Constitution of the United States.

Second. Said Supreme Court erred in holding and deciding that said act is not repugnant to and in conflict with paragraph 3, Section 8 of Article I. of the Constitution of the United States, giving to Congress the power to regulate commerce among the states.

Third. Said Supreme Court erred in holding and deciding that said act is not repugnant to and in conflict with Section 2,
46 Article IV. of the Constitution of the United States, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Fourth. Said Supreme Court erred in holding and deciding that said act is not repugnant to and does not violate the fourteenth amendment of the Constitution of the United States, providing that no state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States; nor deprive any person of life, liberty or property without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

Fifth. Said Supreme Court erred in holding that said act is valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, notwithstanding it operates to prevent the manufacturer of beer from keeping the product of his brewery, which was manufactured and on hand before said act became operative within his county, in marketable condition, thereby compelling the loss and destruction of such product.

Sixth. Said Supreme Court erred in holding said act valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, notwithstanding it authorizes and justifies a certain traffic in beer within the limits of the counties where such act becomes operative, but makes it unlawful for the manufacturer of beer in such counties to manufacture new beer to be used solely in keeping alive the old product which was manufactured and on hand before such act became operative in such counties, thereby necessitating the loss of such product, abridging privileges and immunities of citizens of the United States, and depriving them of their property without due process of law.

47 Seventh. Said Supreme Court erred in holding said act valid and not a violation of the said aforementioned provisions of the Constitution of the United States, notwithstanding it authorizes druggists and registered pharmacists to sell beer, under certain restrictions, within the limits of counties where such act becomes operative, but makes it unlawful for the manufacturer of beer in such counties to manufacture for the purpose of supplying such trade.

Eighth. Said Supreme Court erred in holding that said act could be held valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, by striking out the invalid amendments to Section 15 of said act, relative to the manufacture and sale of wine and cider, the unconstitutional provisions being as follows: "Provided that nothing in this act shall be so construed as to prohibit the sale of wine or cider from home grown fruits in quantities of not less than five gallons, nor shall the provisions of this act be construed to prohibit the manufacture of wine or cider, nor shall the provisions of this act be construed to prohibit the sale at wholesale of wine or cider manufactured in said counties, to parties who reside outside of said county," said provisions being a part of the act at the time local option was adopted in Jackson County, where defendants reside, and operating together with the other provisions of the act to bring about such adoption and the passage of the resolution by the Board of Supervisors of said county, with the violation of which defendants were charged and convicted.

Ninth. Said Supreme Court erred in holding that the un-

48 constitutional provisions of said act, relative to the sale of wine and cider above referred to, could be separated and rejected and the remainder of said act held valid and not repugnant to the said aforementioned provisions of the Constitution of the United States.

For which errors the defendants, Carl Eberle and Stephen H. Carrol, pray that the said final decision of the Supreme Court of the State of Michigan, rendered on the eighth day of December, nineteen hundred and eleven, be reversed and a judgment rendered in favor of the said defendants.

RICHARD PRICE,
Attorney for Defendants, Carl Eberle and Stephen H. Carrol.

48½ [Endorsed:] State of Michigan. Supreme Court. The People of the State of Michigan vs. Carl Eberle and Stephen H. Carrol, Defendants. Assignment of Errors and Prayer for Reversal. Richard Price, Jackson, Michigan.

49 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of Michigan, Plaintiff and Carle Eberle and Stephen H. Carroll, defendants wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn
50 in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Carl Eberle and Stephen H. Carroll as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

to any person within its jurisdiction the equal protection of the laws.

Fifth. Said Supreme Court erred in holding that said act is valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, notwithstanding it operates to prevent the manufacturer of beer from keeping the product of his brewery, which was manufactured and on hand before said act became operative within his county, in marketable condition, thereby compelling the loss and destruction of such product.

Sixth. Said Supreme Court erred in holding said act valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, notwithstanding it authorizes and justifies a certain traffic in beer within the limits of the counties where such act becomes operative, but makes it unlawful for the manufacturer of beer in such counties to manufacture new beer to be used solely in keeping alive the old product which was manufactured and on hand before such act became operative in such counties, thereby necessitating the loss of such product, abridging privileges and immunities of citizens of the United States, and depriving them of their property without due process of law.

47 Seventh. Said Supreme Court erred in holding said act valid and not a violation of the said aforementioned provisions of the Constitution of the United States, notwithstanding it authorizes druggists and registered pharmacists to sell beer, under certain restrictions, within the limits of counties where such act becomes operative, but makes it unlawful for the manufacturer of beer in such counties to manufacture for the purpose of supplying such trade.

Eighth. Said Supreme Court erred in holding that said act could be held valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, by striking out the invalid amendments to Section 15 of said act, relative to the manufacture and sale of wine and cider, the unconstitutional provisions being as follows: "Provided that nothing in this act shall be so construed as to prohibit the sale of wine or cider from home grown fruits in quantities of not less than five gallons, nor shall the provisions of this act be construed to prohibit the manufacture of wine or cider, nor shall the provisions of this act be construed to prohibit the sale at wholesale of wine or cider manufactured in said counties, to parties who reside outside of said county," said provisions being a part of the act at the time local option was adopted in Jackson County, where defendants reside, and operating together with the other provisions of the act to bring about such adoption and the passage of the resolution by the Board of Supervisors of said county, with the violation of which defendants were charged and convicted.

Ninth. Said Supreme Court erred in holding that the un-
48 constitutional provisions of said act, relative to the sale of wine and cider above referred to, could be separated and rejected and the remainder of said act held valid and not repugnant to the said aforementioned provisions of the Constitution of the United States.

For which errors the defendants, Carl Eberle and Stephen H. Carrol, pray that the said final decision of the Supreme Court of the State of Michigan, rendered on the eighth day of December, nineteen hundred and eleven, be reversed and a judgment rendered in favor of the said defendants.

RICHARD PRICE,
Attorney for Defendants, Carl Eberle and Stephen H. Carrol.

48½ [Endorsed:] State of Michigan. Supreme Court. The People of the State of Michigan vs. Carl Eberle and Stephen H. Carrol, Defendants. Assignment of Errors and Prayer for Reversal. Richard Price, Jackson, Michigan.

49 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of Michigan, Plaintiff and Carle Eberle and Stephen H. Carroll, defendants wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn
50 in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Carl Eberle and Stephen H. Carroll as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the 19th day of December, in the year of our Lord one thousand nine hundred and eleven.

[Seal of the U. S. Circuit Court, Western District of Michigan, Southern Division.]

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States for the Western District of Michigan.

Allowed by

RUSSELL C. OSTRANDER,
Chief Justice of the Supreme Court of the State of Michigan.

To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of the Record hereto annexed.

Dated: January 8th, 1912.

CHAS. C. HOPKINS,
Clerk of the Supreme Court of the State of Michigan.

51 Supreme Court of the State of Michigan.

CARL EBERLE and STEPHEN H. CARROLL, Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN, Defendant in Error.

IN THE SUPREME COURT, *ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for Writ of Error, the Writ of Error with allowance endorsed thereon, the citation with acceptance of service endorsed thereon, by the attorney for the adverse party, a copy of the bond duly approved, together with the assignments of error in the Supreme Court of the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing this eighth day of January in the year of our Lord, one thousand nine hundred and twelve.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 23,006. Michigan Supreme Court. Term No. 164. Carl Eberle and Stephen H. Carroll, plaintiffs in error, vs. The People of the State of Michigan. Filed January 11th, 1912. File No. 23,006.

INDEX.

PAGE

Statements of Facts 1-12

Provisions of Michigan Local Option Law..... 2-7

Motion to Direct Verdict..... 9

Specification of Errors Relied Upon..... 11-12

Argument 13-33

Local Option Act Repugnant to the Constitution of the United States 13-29

Arbitrary and Unfair Discrimination Against Home Manufacturer 15-23

Act Protects certain Traffic 24-27

Invalidity of Wine and Cider Clause Invalidates entire Act 29-33

Cases Cited.

Atty. Gen'l vs. Common Council of Detroit,
29 Mich., 108 31

Bartemeyer vs. Iowa
85 U. S. 129, 21 Law Ed., 929.....15, 28

Boston Beer Co. vs. Massachusetts,
97 U. S. 25, 24 Law Ed. 989..... 28

Cooley's Const. Limitations (7th Ed.),
pp. 246, 247 and 249.....29, 32

Eubank vs. City of Richmond,
226 U. S., 137..... 19

Hozza vs. Tiernan,
148 U. S. 655, 37 Law Ed, 601..... 16

Kidd vs. Pearson,
138 U. S. 1, 32 Law Ed. 348..... 28

Mugler vs. Kansas,
123 U. S. 623, 31 Law Ed. 205..... 22

People vs. Michigan Central R. Co.
145 Mich. 140 31

Walling vs. Michigan,
116 U. S. 446, 29 Law Ed. 691..... 16

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 164.

CARL EBERLE, and
STEPHEN H. CARROLL,
Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This case involves the constitutionality of what is known as the "Local Option Law" of the State of Michigan. The plaintiffs in error were stockholders and officers of the Eberle Brewing Company, a corporation, which had been organized under the laws of the State of Michigan, owned a brewing plant, and for many years prior to the first day of May, 1909, conducted the business of manufacturing beer at Jackson, Michigan. It was charged against them in the information filed that they did on the first day of May, 1909, and on divers days and times between that time and the 11th day of September, 1909, manufacture brewed, malt and intoxicating liquors, to wit: beer, contrary to the provisions of a certain resolution adopted by the Board of Supervisors of the County of Jackson, State of Michigan, on the 13th day of April, 1909, and in violation of the provisions of Act No. 207, of the Public Acts of the State of Michigan for the year A. D. 1889, as amended.

The provisions of said Act No. 207 are as follows:

"SECTION 1. It shall be unlawful for any person directly or indirectly, himself or by his clerk, agent or employe, to manufacture, sell, keep for sale, give away or furnish any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, or any mixed liquor or beverages, any part of which is intoxicating, or keep a saloon or any other place where any such liquors are manufactured, sold, stored for sale, given away or furnished in any county of this State on and after the first day of May next following after the adoption by the board of supervisors of such county of a resolution prohibiting the same, as provided by section thirteen of act number two hundred seven of the public acts of eighteen hundred eighty-nine, as amended, so long as said resolution remains unrepealed: Provided, however, That the provisions of this section shall not apply to druggists, or registered pharmacists, selling any such liquors under and in compliance with the restrictions and requirements imposed upon them by the general laws of this State and sections twenty-five and twenty-six of this act as amended."

"SECTION 2. On and after the first day of May next following after the adoption by the board of supervisors of any county of a resolution prohibiting the manufacture of liquors and the liquor traffic, as hereinafter provided in section thirteen of this act, the provisions of the general laws of this State for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving away or delivering spirituous and intoxicating liquors, and malt, brewed, or fermented and vinous liquors shall be and the same are hereby declared suspended and superseded so far as relates to the territory and municipalities within the limits of any such county: Provided, however, That all sales of liquors by druggists, or registered pharmacists, in such counties shall be under the restrictions and requirements imposed upon them by the general laws of this State and this act, as amended."

"SECTION 3. In order to ascertain the will of the qualified electors of each organized county, in regard to such prohibition, it shall be the duty of the county clerk of the counties of this State, severally, upon written application and petition filed with him and addressed to the board of supervisors of the county, signed by not less than one-third of all the qualified

electors thereof, as shown by the poll lists or returns and canvass of the last preceding general election for State officers held in such county, praying that the question, should the manufacture of liquor and the liquor traffic be prohibited within the county, be submitted to the qualified electors of the county, to lay such petitions before the board of supervisors at the earliest opportunity"

Section 7 was repealed

Sections 4, 5, 6, 8, 9 and 10 contain provisions for holding the election and ascertaining the will of the people, which need not be set out in full here.

Section 11 requires the Board of Supervisors to meet on the first Monday after said election to canvass the vote and determine and declare the result thereof.

Section 12 referred to refusal of township or ward to hold election.

"SECTION 13: When the result of the county canvass shall show that a majority of all the legal voters voting on such proposition shall have voted to prohibit within such county the manufacture of liquors and the liquor traffic, and when the board of supervisors shall have so determined and declared, as hereinbefore provided, it shall be the duty of such board of supervisors to order the prohibition within the limits of such county of the manufacture, sale, keeping for sale, giving away or furnishing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, or any mixed liquor or beverage, any part of which is intoxicating, and to prohibit the keeping of a saloon or any other place where such liquors are manufactured, sold, stored for sale, given away or furnished, by resolution adopted at that same meeting of the board, or at a meeting to which the same may be adjourned not more than ten days after such canvass. Such resolution shall be spread in full upon the journal of their proceedings and shall set forth in a preamble the fact that an election submitting a proposition of prohibition as aforesaid was duly held in the county; that sufficient returns and statements have been canvassed by them and the result thereof ascertained; that such result was in the affirmative of such proposition, giving the majority,

and that the same has been so determined and declared by them. Such resolution of prohibition shall take full effect in such county on the first day of May next following its adoption, and shall not be subject to repeal by the board of supervisors within two years next thereafter, after the expiration of which period the board may again on petition of one-third of all the qualified electors thereof, as shown by the poll lists or returns and canvass of the last preceding general election for State officers held in the county, by a majority vote of all the members elect act as in the first instance, and repeal such resolution of prohibition, but not unless a majority of the electors of the county, voting on such proposition, at a subsequent election duly held in accordance with the provisions of this act, shall have declared against the probihition of the manufacture of liquor and of the traffic therein, and upon the repeal of such resolution of prohibition by the board of supervisors, all former suspension and superseding of the general laws of the State relative to the taxation and regulation of the manufacture and sale of intoxicating liquors, as provided in section two of this act, shall cease within such county: Provided, however, That all actions which may have been brought and all rights of actions which may have accrued before such repeal shall remain and continue to exist as fully as if no such repeal had taken place."

"SECTION 14. It shall be the duty of the clerk of such board of supervisors to publish without delay, once in each week until the first day of the next May, in a newspaper published and circulating in such county, to be designated by the board, a copy of the preamble and resolution adopted by the board, as provided by section thirteen of this act: Provided, That if such proposition shall have been decided in the negative, such publication shall not be required. The said clerk shall also, without delay, forward to the secretary of state a certified transcript of such resolution and of so much of the journal of the proceedings of the board of supervisors as pertains to such election, including the tabular statement of votes, together with a copy of the affidavit of publication of the notice of the adoption of the resolution. Such original affidavit of publication shall be filed with the clerk of the board of supervisors, and he shall spread the same on the records of the board, following the record of the adoption of the resolution of prohibition, and the said clerk shall state

next on the record the date when said notice and affidavit of publication was entered for record, and shall then sign the record officially. The record of such resolution of prohibition and the publication of notice, and all duly certified copies thereof, shall be the evidence of the facts therein stated so far as relates to the territory and municipalities within the limits of said county; and the regularity of any proceedings prior to the adoption of such resolution by the board of supervisors shall not be open to question on the examination or trial of any person for the violation of any of the provisions of section one of this act."

"SECTION 15. The prohibitory provisions of this act shall take effect and have full force within such county of this State on and after the first day of May, immediately following the adoption by the board of supervisors of such county of the resolution ordering such prohibition and upon publication of the notice of the adoption of such resolution: Provided, however, That nothing in this act shall be so construed as to prohibit the sale of wine for sacramental purposes, nor shall anything herein contained prohibit druggists or registered pharmacists from selling or furnishing pure alcohol for medicinal, art, scientific and mechanical purposes, nor prohibit the sale of wine or cider from home-grown fruit in quantities of not less than five gallons, nor shall the provisions of this act be construed to prohibit the manufacture of wine or cider, nor shall the provisions of this act be construed to prohibit the sale at wholesale of wine or cider manufactured in said county to parties who reside outside of said county."

Section 16 provides the penalty for the violation of the law, which is "a fine of not less than fifty dollars nor more than two hundred dollars, and the costs of prosecution, and to imprisonment in the county jail not less than twenty days nor more than six months, in the discretion of the court."

Sections 17 to 24 inclusive refer to matters not necessary to be set out.

"SECTION 25. Every druggist keeping a drug store in any county adopting prohibition under this act shall make and swear to, or cause to be made and sworn to a true written or printed statement signed and duly sworn to by himself or his clerk, on Monday

of each and every week, giving the full name and residence of every person procuring liquor at his drug store during the last week, the kind and quantity of liquor procured, and the date of procuring the same and the object for which each purchase was made, and on such Mondays shall deliver or mail, prepaying the postage thereon, the same to the prosecuting attorney of the county where such store is situated, who shall preserve the same in his office, and all such statements shall be open to the inspection of all citizens. Every such druggist so keeping a drug store in any county adopting prohibition under this act shall make and swear to or cause to be made and sworn to a true written or printed statement signed and duly sworn to by himself or his clerk on the first Monday of each and every month, giving the number of consignments of liquor received by the drug store over which he shall have charge since making his last previous monthly statement, the dates when such consignments of such liquors were received, the kind and quantity of such liquors so received, and the name of the person or persons, firm or firms, corporation or corporations from which such liquors were purchased, and on said first Monday of each and every month shall deliver or mail, prepaying the postage thereon, the same to the prosecuting attorney of the county where such store is situated, who shall preserve the same in his office, and all such statements shall be open to the inspection of all citizens."

"SECTION 26. Every druggist keeping a drug store in any county adopting prohibition under this act shall by himself or his clerk be permitted to sell such vinous, malt, brewed, fermented, spirituous and intoxicating liquors for medicinal purposes, but only on the written (not printed or typewritten) prescription of a regular, practicing physician: Provided, That the physician making such prescription shall state therein the name of the person for whom such liquor is prescribed, the kind and quantity of liquor prescribed, and shall issue the same in good faith and upon personal knowledge that the physical condition of the person for whom such liquor is prescribed requires the same for medicinal purposes; or upon the written and signed application of the superintendent of any hospital, medical or educational institution where such liquors are used only for medicinal or scientific purposes. Such druggist or clerk shall, before delivering such liquor to a

purchaser, enter the full name and residence of such purchaser, together with the kind and quality (quantity) of liquor procured, the date of procuring the same and the object for which such liquor was procured, in a blank book which shall be kept for that purpose by druggists keeping a drug store, and after having once filled any such prescription or application so made, as aforesaid, shall write or stamp across the face thereof the word 'cancelled,' together with the date when such prescription or application was filled and shall sign his name thereto. Each such prescription or application shall be plainly written, dated and signed by the full name of the maker thereof, and a true copy of all such prescriptions or applications filed by any such druggist shall be filed by him with the prosecuting attorney of the county wherein such drug store is located at the time of filing his report of sales as is hereinbefore required. Every such druggist, so keeping a drug store as aforesaid, shall be permitted to sell pure alcohol or any vinous, fermented or spirituous liquors for art, chemical, scientific or mechanical purposes, but only on the written application of the purchaser stating the purpose for which such liquors are purchased, which application shall be subscribed and sworn to by the person making such purchase. All such statements so received and filled by any such druggist, shall be cancelled, dated, signed and filed in the manner hereinbefore prescribed for medicinal prescriptions and applications. It shall be the duty of the secretary of state to prepare printed blank forms conforming to the provisions of this act, and to furnish the same in proper quantities to the clerks of the several counties operating under the provisions of this act. Said clerks shall furnish the said blanks to druggists making application therefor, and druggists shall use such blank forms when making reports to the prosecuting attorney."

The general law of the State referred to in Sections 1 and 2 above is Act No. 313 of the Public Acts of 1887, which is an act entitled "An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous and intoxicating liquors, and malt, brewed or fermented liquors and vinous liquors in this State, and to repeal all acts or parts of acts inconsistent with the provisions of this act," the third section of which law provides: "The penal provisions of this

act shall not apply to druggists who sell liquors for chemical, scientific, medicinal, mechanical, or sacramental purposes only, and in strict compliance with law." Then follow certain provisions in regard to sale to minors, Indians and intoxicated persons, etc., and the giving of a bond, which need not be set out in full.

In April, 1909, the required petition having been presented to the County Clerk, an election was had to determine whether the manufacture of liquor and liquor traffic should be prohibited within Jackson County, and a majority of those voting having voted to prohibit such manufacture and traffic, a preamble and resolution was adopted by the Board of Supervisors of said County on the 13th day of April, 1909, in pursuance of Section 13 of said law, giving effect to such prohibition within the said County, to take effect on the first day of May following.

On the first day of May, 1909, when the law was thus given effect in Jackson County, the Eberle Brewing Company had in its vaults about seventeen hundred barrels of beer worth five dollars ($5.00) a barrel, which they were unable to dispose of before the taking effect of the law. It is undisputed that this beer which had been manufactured and was on hand on the first day of May, 1909, would have become worthless and unmarketable if a new brew were not made and introduced into it as occasion required in order to keep it alive. For the purpose of preventing this beer from spoiling and to preserve it until such time as it could be marketed, the company made a new brew, which was used solely for the purpose of introducing it into the old beer to preserve it. This new brew was not in fit condition to drink, and none of it was made to use except for the purpose of using it in the preservation of the old beer. The company had purchased some new machinery and commenced the manufacture of temperance beer after the first day of May, 1909, using the same vats and machinery which had been used before in the manufacture of lager beer in connection with the new machinery which had been purchased for that purpose. On the 11th day of September, 1909, the Sheriff of Jackson County visited the plant of the brewing company and found five vats full of what he supposed was new lager beer. Two of these vats contained new lager beer. The other three contained temperance beer, which, upon analysis, was found to contain no alcohol whatever.

The plaintiffs in error were arrested and charged with the violation of the law, as stated in the first paragraph of this brief. There was no dispute about the facts in the case, one of the plaintiffs in error, Mr. Eberle, taking the witness stand and testifying to the manufacture of the new brew and the purpose for which it was made and used. A motion was made to have a verdict directed in favor of the respondents for several reasons, among which were the following:

> "First. Because Act No. 207 of the Public Acts of the State of Michigan for the year 1889, as amended, upon which said information is based, and with the violation of which these defendants are charged, is repugnant to the Constitution of the United States and the constitution of this State, and therefore void.
>
> "Second. Because said act as amended is in conflict with Paragraph 3, Section 8 of Article 1 of the Constitution of the United States, giving to Congress the power to regulate commerce.
>
> "Third. Because said act as amended is repugnant to and in conflict with Section 2, Article 4 of the Constitution of the United States, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.
>
> "Fourth. Because said act as amended is repugnant to and violates the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; and also violates Section 32, Article 6 of the Constitution of this State.
>
> "Fifth. Because it appears from the evidence that whatever brewed, malt or intoxicating liquor or beer was manufactured by the defendants or the Eberle Brewing Company after the first day of May, 1909, was manufactured for the purpose of preserving beer which had been manufactured and had been in existence before the first day of May, 1909, and to prevent the loss of such property, and was used for that purpose, and the said defendants had the right to protect their property and prevent its loss in such manner" (Record 10).

This motion was denied. The same grounds as those cov-

ered by the motion were also presented in requests to charge on behalf of the plaintiffs in error, which were also refused, and the Court charged the jury, in substance, that the undisputed testimony showed that the respondents were guilty, as charged. A verdict of guilty was returned, and the case was taken to the Supreme Court of the State of Michigan, where the same objections to the constitutionality of the act were urged as are set forth in the motion above referred to, and also that the facts did not show a violation of the law because the new brew which had been manufactured was only for the purpose of preserving the beer which had been in existence before the first of May, 1909, and to prevent its loss and destruction.

The Supreme Court of the State of Michigan held, as did the Circuit Court, that the manufacture of the new brew, although merely for the purpose of preserving the old beer which was in existence at the time the law took effect, was, notwithstanding, a violation of the law (Record, 23).

The Supreme Court also held the law as a whole valid as against the objections urged against its constitutionality, except the following portion of Section 15, which was declared unconstitutional and invalid:

> "Provided, however, that nothing in this act shall be so construed as to prohibit * * * the sale of wine or cider from home-grown fruit in quantities of not less than five gallons, nor shall the provisions of this act be construed to prohibit the manufacture of wine or cider, nor shall the provisions of this act be construed to prohibit the sale at wholesale of wine or cider manufactured in said county to parties who reside outside of said county."

As to this portion of the law, the Supreme Court state:

> "It is clear that the general legislative purpose contained in the act may be accomplished with the objectionable provisions stricken out, leaving the act 'complete in itself and capable of being executed wholly independent of that which was rejected'" (Record 25).

The case comes to this Court upon writ of error. The particular assignments of error upon which plaintiffs in error rely are as follows:

SPECIFICATION OF ERRORS RELIED UPON.

"First. That the Supreme Court of the State of Michigan erred in holding and deciding that Act No. 207 of the Public Acts of the State of Michigan for the year 1889 is valid, the validity of said act having been denied and drawn in question by the defendants on the ground of its being repugnant to the Constitution of the United States.

"Second. Said Supreme Court erred in holding and deciding that said act is not repugnant to and in conflict with Paragraph 3, Section 8 of Article 1, of the Constitution of the United States, giving to Congress the power to regulate commerce among the States.

"Third. Said Supreme Court erred in holding and deciding that said act is not repugnant to and in conflict with Section 2, Article IV, of the Constitution of the United States, providing that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

"Fourth. Said Supreme Court erred in holding and deciding that said act is not repugnant to and does not violate the Fourteenth Amendment of the Constitution of the United States, providing that no State shall make or enforce any law which abridges the privileges or immunities of citizens of the United States; nor deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Fifth. Said Supreme Court erred in holding that said act is valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, notwithstanding it operates to prevent the manufacturer of beer from keeping the product of his brewery, which was manufactured and on hand before said act became operative within his county, in marketable condition, thereby compelling the loss and destruction of such product.

"Sixth. Said Supreme Court erred in holding said act valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, notwithstanding it authorizes and justifies a certain traffic in beer within the limits of the counties where

such act becomes operative, but makes it unlawful for the manufacturer of beer in such counties to manufacture new beer to be used solely in keeping alive the old product which was manufactured and on hand before such act became operative in such counties, thereby necessitating the loss of such product, abridging privileges and immunities of citizens of the United States, and depriving them of their property without due process of law.

"Seventh. Said Supreme Court erred in holding said act valid and not a violation of the said aforementioned provisions of the Constitution of the United States, notwithstanding it authorizes druggists and registered pharmacists to sell beer, under certain restrictions, within the limits of counties where such act becomes operative, but makes it unlawful for the manufacturer of beer in such counties to manufacture for the purpose of supplying such trade.

"Eighth. Said Supreme Court erred in holding that said act could be held valid and not repugnant to the said aforementioned provisions of the Constitution of the United States, by striking out the invalid amendments to Section 15 of said act, relative to the manufacture and sale of wine and cider, the unconstitutional provisions being as follows: 'Provided that nothing in this act shall be so construed as to prohibit the sale of wine or cider from home-grown fruits in quantities of not less than five gallons, nor shall the provisions of this act be construed to prohibit the manufacture of wine or cider, nor shall the provisions of this act be construed to prohibit the sale at wholesale of wine or cider manufactured in said counties, to parties who reside outside of said county,' said provisions being a part of the act at the time local option was adopted in Jackson County, where defendants reside, and operating together with the other provisions of the act to bring about such adoption and the passage of the resolution by the Board of Supervisors of said County, with the violation of which defendants were charged and convicted.

"Ninth. Said Supreme Court erred in holding that the unconstitutional provisions of said act, relative to the sale of wine and cider above referred to, could be separated and rejected and the remainder of said act held valid and not repugnant to the said aforementioned provisions of the Constitution of the United States" (Record, 29).

ARGUMENT.

The portion of the act which was held obnoxious to the constitutional objections urged against it by the Supreme Court of the State of Michigan is the latter part of the proviso of Section 15; that is, that portion of the proviso which exempts from the operation of the law

> "the sale of wine or cider from home-grown fruit in quantities of not less than five gallons, nor shall the provisions of this act be construed to prohibit the manufacture of wine or cider, nor shall the provisions of this act be construed to prohibit the sale at wholesale of wine or cider manufactured in said county to parties who reside outside of said county."

In holding this portion of the act unconstitutional, the Court construed the law to have reference in each instance to wine and cider manufactured from home-grown fruit, although the law in terms does not confine it to home-grown fruit, except as to the sale of it in five-gallon lots.

It will be observed from the reading of the law above set out: First, that a certain traffic and trade in liquor is provided for and protected in counties adopting local option, whereby all malt, brewed, fermented, vinous, spirituous and intoxicating liquors may be sold for medicinal purposes, and pure alcohol or any vinous, fermented or spirituous liquors may be sold for art, chemical, scientific or mechanical purposes; second, there is no prohibition of the sale of wine for sacramental purposes, nor of the sale of wine and cider made from home-grown fruit in quantities of not less than five gallons; third, the manufacture of wine and cider (from home-grown fruit) is not interfered with or prohibited at all; fourth, wine and cider may be manufactured (from home-grown fruit) without stint in any county adopting local option, and sold in that county at wholesale to parties who reside outside the county; fifth, the manufacture of every kind of vinous, malt, brewed, fermented, spirituous or intoxicating liquors, except wine and cider, and also of any mixed liquor or beverage, any part of which is intoxicating, is absolutely prohibited; sixth, every person, natural or artificial, is prohibited and restrained from manufacturing beer within the county for any purpose whatever, either to supply the

trade permitted and fostered under the law within the county, or to sell to those who reside outside the county, or outside the State of Michigan.

I am fully aware of the repeated decisions of this Court, wherein it has been held that a State may, in the reasonable exercise of its police power and for the protection of the health, safety and morals of the people, prohibit the manufacture of liquor within its borders, and I do not question the soundness of those decisions. On the contrary, I rely upon the principles laid down in those decisions in support of the objections which are here made to the constitutionality of the act in question. The local option law of the State of Michigan is unique, and the only one of its kind. It goes far beyond any other act of this character which I have been able to find or which has been before this Court for examination as to its constitutionality, in that it discriminates against the manufacturer of liquor in counties adopting local option in favor of the manufacturer outside the county or outside the State. Other prohibition laws, as for instance, the law of the State of Kansas, permit the home manufacturer to manufacture for all purposes for which the commodity may be used within the State, but the law of Michigan, while it protects and makes lawful a certain traffic in liquor within the County, denies to the local manufacturer the right to supply this traffic. It presents the striking spectacle of a law put into operation by the vote of the people of a County, securing to themselves the right to purchase and traffic in liquors, including beer, but saying to the local manufacturer, whose money is tied up in the business:

> "You are to take no part in this traffic, and the product which you have on hand must go to destruction; you cannot sell it within the County under the restrictions and conditions that other manufacturers outside the County may sell their product here; and you cannot preserve it or keep it alive in order that you may dispose of it elsewhere."

This argument applies not only to that portion of the law which the Supreme Court of the State of Michigan held unconstitutional, but also to the other portions pointed out, which authorize the traffic in liquor and beer in dry Counties. I shall deal with the question of declaring one part of the Act unconstitutional, while holding the rest valid, in a subsequent part of this brief, and shall contend that the portion of the law which was held unconstitutional by the Su-

preme Court of the State of Michigan was not independent of the rest of the law, and could not be stricken out under the circumstances of this case, without carrying with it the whole law. For the present I wish to deal with that feature of the law to which I have called attention, to-wit, the arbitrary and unfair discrimination against the home manufacturer.

Bartemeyer vs. Iowa, 85 *U. S.*, 129; 21 *Law Ed.*, 929.

In this case, the Iowa prohibition law was attacked as being in conflict with the Fourteenth Amendment, and Mr. Justice Miller stated in the course of the opinion that questions of this character are of such importance as

> "to require the most careful and serious consideration, and are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position."

The defendant was charged with selling intoxicating liquors and admitted the sale, but claimed that he was the holder, owner and possessor of the glass of liquor sold prior to the day on which the law was passed. It was found, however, that as a matter of fact, the record did not present sufficient proof that he was the owner of the liquor prior to the passage of the law. The following language from the opinion of Mr. Justice Miller is significant:

> "The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent a State Legislature from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception; that exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of Wynehamer vs. People, 13 N. Y., 486, has held that as to such property the statute would be void for that reason."

Mr. Justice Bradley in the same case said:

> "No one has ever doubted that a Legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with the vested rights of property. When such rights stand in the way of public good, they can be removed by awarding compensation to the owner. • • • That portion of the Fourteenth Amendment by which

> no State may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty or property without due process of law, has now become the fundamental law of this country, so that life, liberty and property are sacred rights which the constitution guarantees to its humblest citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law."

Mr. Justice Field, concurring in the same case, said:

> "I have no doubt of the power of the State to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any Act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State the Fourteenth Amendment affords protection."

Giozza vs. Tiernan, 148 *U. S.*, 655; 37 *Law Ed.*, 601.

In this case it was said by this Court:

> "Undoubtedly, the Constitution of the United States forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights."

Walling vs. Michigan, 116 *U. S.*, 446; 29 *Law. Ed.*, 691.

In this case, a Statute of the State of Michigan, which imposed a specific tax on persons engaged in the business of selling liquors at wholesale, or of soliciting or taking orders for such liquors, to be shipped into the State from places out of the State, not having their principal places of business in the State, without imposing a like tax on persons engaged in a like business in reference to liquors manufactured in the State, was held unconstitutional and void, because it discriminated unfavorably against citizens and products of other states, and therefore was a regulation of commerce repugnant to the Constitution. I quote from the opinion of Mr. Justice Bradley in that case:

"The single question, therefore, is, whether the statute of 1875 is repugnant to the Constitution of the United States. Taken by itself, and without having reference to the Act of 1881, it is very difficult to find a plausible reason for holding that it is not repugnant to the Constitution. It certainly does impose a tax or duty on persons who, not having their principal place of business within the state, engage in the business of selling, or of soliciting the sale of, certain described liquors, to be shipped into the State. If this is not a discriminating tax levied against persons for selling goods brought into the state from other states or countries, it is difficult to conceive of a tax that would be discriminating. It is clearly within the decision of Welton vs. Missouri, 91 U. S., 275 (Bk. 23, L. Ed., 347), where we held a law of the state of Missouri to be void which laid a peddler's license tax upon persons going from place to place to sell patent and other medicines, goods, wares or merchandise, not the growth, product or manufacture of that state, and which did not lay a like tax upon the sale of similar articles, the growth, product or manufacture of Missouri. The same principle is announced in Hinson vs. Lott, 8 Wall., 148 (75 U. S. bk. 19, L. Ed., 387); Ward vs. Maryland, 12 Wall., 418 (79 U. S. bk. 20, L. Ed., 449); Guy vs. Baltimore, 100 U. S., 438 (Bk. 25, L. E., 744); County of Mobile vs. Kimball, 102 U. S., 691, 697 (Bk. 26, L. Ed., 238, 239); Webber vs. Va., 103 U. S., 344 (Bk. 26, L. Ed., 565). * * *

"Many state decisions might also be cited in which the same doctrine is announced. Thus, in the case of Higgins vs. 300 Casks of Lime, 130 Mass., 1, it is said: 'The result of all these decisions is, that the several states have no authority to prescribe different regulations in relation to the commerce in certain articles, dependent upon the state from which they are brought. This rule in no manner controls or limits the power of a state to enact appropriate health or inspection laws, for such laws are necessarily uniform, and are not dependent upon place.' In State vs. Furbush, 72 Maine, 495, construing a statute of Maine, the Supreme Court of that state says: 'The act is unconstitutional. It allows goods manufactured in this state to be peddled free; and exacts a license fee from those who peddle similar goods which are manufactured out of the state. Such a discrimination in favor of goods manufactured in this state, and against goods manu-

factured in other states, violates the Federal Constitution.' In State vs. North, 27 Mo., 464, where an act of Missouri imposed a tax upon merchants for all goods purchased by them, except such as might be the growth, product or manufacture of that state, and manufactured articles the growth or product of other states, it was held by the Supreme Court of that state that the law was unconstitutional and void. The court says: 'From the foregoing statement of the law and facts of this case it will be seen that it presents the question of the power of the states, in the exercise of the right of taxation, to discriminate between products of this state and those manufactured in our sister states.' And after an examination of the causes which led to the adoption of the Federal Constitution, one of the principles of which was the necessity for the regulation of commerce and the laying of imposts and duties by a single government, the court says: 'But whatever may be the motive for the tax, whether revenue, restriction, retaliation or protection of domestic manufactures, it is especially a regulation of commerce, and in effect an exercise of the power of laying duties on imports; and its exercise by the states is entirely at war with the spirit of the Constitution, and would render vain and nugatory the power granted to Congress in relation to these subjects. Can any power more destructive to the union and harmony of the states be exercised than that of imposing discriminating taxes or duties on imports from other states? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state of feeling that would seek its gratification in any measures regardless of the consequences.' See also Norris vs. Boston, 4 Met., 282. 293; S. C. in error among the Passenger Cases, 7 How., 283 (48 U. S., Bk. 12, L. Ed., 702); Oliver vs. Washington Mills, 11 Allen, 268; Pierce vs. State, 13 N. H., 582; McGuire vs. Parker, 32 La. Ann., 832: Wiley vs. Parmer, 14 Ala., 627; Scott vs. Watkins, 22 Ark., 556, 564; State vs. McGinnis, 37 Ark., 362; State of Browning, 62 Mo., 591; Daniel vs. Richmond, 78 Ky., 542. * * *

"Another suggestion in the opinion referred to is, that although the tax imposed by the act of 1875 may be a regulation of the introduction of spirituous

liquors from another state into the State of Michigan, yet that regulation is not prohibition, and that there is nothing in the act that amounts to prohibition. The language of the court is: 'The statute does not prohibit the introduction and sale of liquors made outside of the state. It simply taxes the person who carries on the business here by making sales in this state. It in no way interferes with the introduction of the liquors here. It tolerates and regulates, but seeks not to prohibit. I think in this case no question can be successfully made under the clause of the Constitution until the point has been reached where regulation ceased and prohibition begins.' We are unable to adopt the views of that learned tribunal as here expressed. It is the power to 'regulate' commerce among the several states which the Constitution in terms confers upon Congress; and this power, as we have seen, is exclusive in cases like the present, where the subject of regulation is one that admits and requires uniformity, and where any regulation affects the freedom of traffic among the states.

"Another argument used by the Supreme Court of Michigan in favor of the validity of the tax is that it is merely a tax on an occupation which, it is averred, the state has an undoubted right to impose, and reference is made to Brown vs. Md., 12 Wheat, 444 (25 U. S., Bk. 6, L. Ed., 687); Nathan vs. La., 8 How., 80 (49 U. S., Bk. 12, L. Ed., 995); Pierce vs. New Hampshire, 5 How., 593 (46 U. S., Bk. 12, L. Ed., 296); Hinson vs. Lott, 8 Wall., 148 (75 U. S., Bk., 19 L. Ed., 387); Machine Co. vs. Gage, 100 U. S., 676 (Bk. 25, L. Ed., 754). None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another state, or against the citizens of another state."

Eubank vs. City of Richmond, 226 U. S., 137.

This was a case involving the validity of an ordinance of the City of Richmond and the Statute under which it was enacted, which gave to councils of cities and towns the right

"to make regulations concerning the building of houses in the city or town, and in their discretion * * * in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to

leave a certain percentage of lots free from buildings, and to regulate the height of buildings."

The City Council of the City of Richmond, under the authority of this Statute, had passed an ordinance providing:

> "That whenever the owners of two-thirds of property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than 5 feet nor more than 30 feet from the street line. * * * And no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line!"

Eubank owned a lot 33 feet wide, on the south side of Grace street, between 28th and 29th streets, and obtained a permit to erect a dwelling according to certain plans and specifications. Shortly after he received a permit, two-thirds of the property owners on the side of the square where the house was to be erected, petitioned for the establishment of a building line, in response to which a building line was established by the Street Committee "about fourteen (14) feet from the true line of the street, and on a line with the majority of the houses." Eubank was notified that he must build so as to conform to this line, and the house which he proposed to erect did, as a matter of fact, conform to the line with the exception of a bay window, which projected over the line about three feet.

The controversy found its way to this court, where the ordinance was held invalid, and I quote the following from the opinion written in the case by Mr. Justice McKenna:

> "Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. Chicago, B. & Q. R. Co. vs. Illinois, 200 U. S. 561, 50 L. Ed. 596; 26 Sup. Ct. Rep., 341; 4 Ann. Cas., 1175.

And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of the government.' District of Columbia vs. Brooke, 214 U. S., 138, 149; 53 L. Ed., 941, 945; 29 Sup. Ct. Rep., 560. But necessarily it has its limits, and must stop when it encounters the prohibitions of the Constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a straggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the Constitution. Noble State Bank vs. Haskell, 219 U. S., 104; 55 L. Ed., 112; 32 L. R. A. (N. S.), 1062; 31 Sup. Ct. Rep., 186; Ann. Cas., 1912a, 487. The point where particular interests or principles balance 'cannot be determined by any general formula in advance.' Hudson County Water Co. vs. McCarter, 209 U. S., 349, 355; 52 L. Ed., 828, 831; 28 Sup. Ct. Rep., 529; 14 Ann. Cas., 560.

"But in all the cases there is the constant admonition, both in their rule and examples, that when a statute is assailed as offending against the higher guaranties of the Constitution, it must clearly do so to justify the courts in declaring it invalid. This condition is urged by defendant in error, and attentive to it we approach the consideration of the ordinance.

"It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even

capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and, viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of the line, between 5 and 30 feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence,—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property, exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power."

Mugler vs. Kansas, 123 *U. S.*, 623; 31 *Law. Ed.*, 205.

In this case, the prohibition law of the State of Kansas was under investigation, and was held to be valid by a divided court. As before remarked, the Kansas law did not discriminate against the citizens of the state or the home manufacturer, as does the Michigan law, but permitted the local manufacturer to manufacture and supply such trade and traffic in liquor as was permitted within the state. There is a discussion of the principle involved, however, in the majority opinion written by Mr. Justice Harlan, which I think very applicable to the present case, and which, it seems to me, indicates quite clearly that were it the Michigan law which was under discussion in place of the Kansas law, the act would never have been held constitutional.

I quote as follows:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund Cases, 99 U. S. 718 (25:201), the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in Marbury vs. Madison, 5 U. S., 1 Cranch, 137, 167 (2:60, 70), 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

* * * * * *

"Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confined to the general government. Henderson vs. Mayor of N. Y., 92 U. S., 259 (23:543); Hannibal & St. J. R. R. Co. vs. Husen, 95 U. S., 465 (24:527); New Orleans Gas Light Co. vs. Louisiana Light Co., 115 U. S., 650 (29:516); Walling vs. Michigan, 116 U. S., 446 (29:691); Yick Wo. vs. Hopkins,

118 U. S., 356 (30:220); Morgan's Steamship Co. vs. Louisiana Board of Health, Id., 450 (30:237)."

As before observed, the Michigan law protects and provides for a certain traffic in liquor in counties adopting local option, and does not interfere with the sale of malt, brewed, fermented, vinous, spirituous or intoxicating liquors for medicinal purposes, or the sale of alcohol, or any vinous, fermented or spirituous liquor for art, chemical, scientific and mechanical purposes. The druggists and registered pharmacists, however, who are authorized to make these sales, are obliged to use an article imported, either from without the state, or beyond the borders of the county where they reside, and manufacturers of beer, such as the plaintiffs in error in this case, are prohibited, not only from manufacturing for this trade, but also from supplying the same from beer manufactured and on hand prior to the passage of the act. The act might as well have provided in plain words that druggists and registered pharmacists, who are authorized to sell liquors by the provisions of the act, shall only sell such as have been purchased beyond the borders of the county, or counties where the act takes effect, which, in most cases, means that the article must be imported from another state. If it had so provided, could it be successfully defended against the accusation that it was a deprivation of the rights and privileges of the citizens of this state, guaranteed them by the Constitution; a denial of the equal protection of the laws; an interference with the power of Congress to regulate commerce between the states; and a taking of property without due process of law?

But the act goes still further, and makes still more glaring discriminations. It permits the sale of wine and cider from home-grown fruit in quantities of not less than five gallons. It permits the manufacture of wine and cider (from home-grown fruit) without any stint whatever, and permits the sale of the same at wholesale within the county to parties who reside outside of the county. In other words, wine and cider may be manufactured *ad libitum* (from home-grown fruit), and those who reside without the boundaries of a county where local option is in force, may come into the county, and there purchase at wholesale, all the wine and cider they please, while those who reside within the county are obliged to witness this traffic, and are told that the privilege that is accorded the residents of the neighboring counties and states is denied them; because they live in a dry county.

How can it be argued for one moment that the public morals, or public health, are conserved by legislation such as this, or that any requirement of the police power of the state demands such ridiculous discrimination between citizens even of the same state? It is nothing more or less than an arbitrary, tyrannical and useless restriction, inflicting injury upon citizens who come within its purview, depriving them of their property, and entailing loss and damage upon them, without any benefit to be derived therefrom in the interest of the community. It may be said that inasmuch as the Supreme Court of the State of Michigan held the wine and cider clause to be unconstitutional and invalid, that arguments based upon that clause are beside the mark, but I call attention to it here because, as was said before, I shall claim that the part which has been held unconstitutional is so bound up with the remainder of the act, and plays such a part in giving the act operation in "dry counties," that the one cannot be declared invalid without making the other invalid also; but even with the wine and cider clause stricken out, the act is still obnoxious to the objections urged against it, because the provisions in regard to the traffic in malt, brewed, fermented, vinous, spirituous and intoxicating liquors for medicinal, art, chemical, scientific and mechanical purposes are equally discriminative and equally as unjust and unreasonable as the clauses in regard to wine and cider.

What reason can be advanced for the provision that the druggists and pharmacists who are authorized to make sale of malt and brewed liquors must use an article which is imported either from without the state or beyond the borders of the county? One is as intoxicating as the other. Why should the home manufacturer of beer be obliged to see malt and brewed liquors sold in the community where he lives, under the protection of the law, and he be forbidden to supply the trade? Is it not a monstrous thing and at variance with all our constitutional guaranties to say that a citizen of a county that chances to adopt local option and who has on hand a large quantity of beer should be compelled to sit by and see the imported article sold to his neighbors, while he is not only forbidden to sell his own product to the same trade, but forbidden also to preserve it from destruction, that he may, if opportunity affords, sell it elsewhere? Wine and hard cider, it will be admitted, are much more intoxicating than beer, and wine and cider from home-grown fruit are just as intoxicating, it will be admitted, as from fruit that is not home-grown. If it is thought well to permit the sale of wine and cider from home-grown fruit in five-gallon quantities, what reason can exist for prohibiting the sale of beer in the same quantities? If malt, brewed, fermented, vinous, spirit-

uous or intoxicating liquors manufactured beyond the confines of the county may be sold for medicinal purposes, or alcohol, vinous, fermented or spirituous liquor may be imported for art, chemical, scientific and mechanical purposes, why should not the home article be sold for the same purposes? Why should it be a crime to sell the article manufactured within the county and be lawful to sell the imported article? Why should a traffic and trade in liquors be built up and protected within the county for the benefit of citizens outside the county or outside the state? In short, why should a man's property be taken from him, his business ruined, and a trade established under his very nose which he is forbidden to take part in, or profit by?

If wine and cider can be sold at wholesale to parties who reside outside the county, why shouldn't it be sold at wholesale to parties who reside inside the county? Why should it be sold in five-gallon lots to one set of citizens, and at wholesale to the other set, or if any reason can be thought of why such a distinction should be maintained between citizens who reside inside the county, and those who reside outside the county, why should not beer be manufactured and sold in the same way, to wit: in five-gallon lots to those residing in the county, and at wholesale to those residing outside the county?

Nothing could be more senseless, more arbitrary, or a greater infringement on the rights of citizenship than such legislation as this. It is not only a deprivation of the rights and privileges of the citizen, guaranteed him under the Constitution, and a taking of property without due process of law, but it is an unjust interference with interstate commerce. If it is unlawful for a state to restrict the sale of foreign articles in favor of home manufacture, vice versa, it must be equally unlawful to restrict the manufacture of the home article in favor of the foreign article. If the legislature of a state should enact a law that druggists and pharmacists, and others who are authorized to sell malt, brewed or fermented liquors under such conditions, should sell only such as were manufactured in another state, would anyone contend for a moment that such legislation could stand, or could be sustained as constitutional? Yet, in effect, that is precisely what the law under consideration does. It permits the sale, and at the same time provides that the articles sold cannot be manufactured within the county: not only this, but that the article already manufactured cannot be sold for a

lawful purpose—a purpose made lawful by the act itself—and cannot be preserved that it may be unlawfully sold.

No reason based upon public safety, public health or public morals, or the proper exercise of the police power of the state can be urged for such arbitrary and useless discrimination. As was said in the case of Weil vs. Calhoun, 25 Fed. Reporter, 865, in discussing the Georgia act:

> "What would prohibition be worth with a domestic wine shop on every corner? The proviso exempting domestic wines ought never to have been in the bill, if its avowed purpose was ever to be carried out. A man is just as drunk, just as much a brute, just as much a worthless excresence, who is drunk on domestic wines, as though he got drunk on brandy or champagne."

So, too, the medicinal properties of malt, brewed, fermented, vinous, spirituous or intoxicating liquors which happen to be manufactured in Jackson County are presumably just as great as that manufactured outside the county.

In the opinion of the Supreme Court of the State of Michigan, written by Mr. Justice McAlvay, reference is made (R. 23) to the case of Mugler vs. Kansas, supra, which had been largely quoted from in our brief, and the statement is made, referring to the Kansas Statute, that its "provisions and exceptions are identical with our law, with one exception, which will be discussed later." We presume that the exception here referred to is the wine and cider clause, because that is the only exception which the Court seem to have discussed later in the opinion. But this is not the only respect in which the Kansas Statute differs from the Michigan law. There is an exception of much more importance, which we called to the attention of the Court in our brief, but upon which no comment is made in the opinion. It is this: the Kansas law expressly permitted the manufacture and sale of liquor within the state for every purpose for which it might be sold within the state, to wit: for medicinal, scientific and mechanical purposes. In other words, the Kansas Statute operated uniformly upon all the citizens of the state alike, and discriminated against none. Therefore, the case of Mugler vs. Kansas is not authority by which to sustain the Michigan act, nor is there any authority outside of the decision here being reviewed, so far as I have been able to ascertain, which upholds the validity of a law such as the Michigan Local Option Statute, as against the objections which are urged against it upon this record.

The construction which the Supreme Court of the State of Michigan place upon the law is such as to forbid even the manufacture of a new brew of beer for the purpose of preserving the old beer which was on hand at the time the law took effect. This would lead to the destruction of the beer on hand at the time the law took effect, as the same could only be kept alive and in a marketable condition by inserting a new brew from time to time as occasion required. It is true that the Courts have held that so far as the machinery, plant and appliances of liquor and beer manufactories are concerned, the fact that the adoption of a prohibition law makes them practically useless, does not make the law unconstitutional, but no case which I have found has yet gone to the extent of holding that the legislature of a state would have a right to pass a law, the effect of which would necessitate the destruction of the manufactured article in existence at the time the law took effect. In the case of Bartemeyer vs. Iowa, 85 U. S., 129; 21 Law. Ed. 929, it was said by this Court:

> "The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent a state legislature from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception; that exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of Wynehamer vs. People, 13 N. Y., 486, has held that as to such property the statute would be void for that reason."

Practically the same principle was enunciated in the case of Kidd vs. Pearson, 138 U. S., 1; 32 Law. Ed., 348, where it was said:

> "The proposition that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded."

In the case of Boston Beer Company vs. Massachusetts, 97 U. S., 25; 24 Law. Ed. 989, this Court said:

> "We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of Bartemeyer vs. Iowa, was

not in existence when the liquor law of Massachusetts was passed."

Plaintiffs in error, having on hand seventeen hundred barrels of beer "lawfully called into existence" at the time this law took effect, and it being undisputed that all of this beer would spoil were it not preserved by the insertion of a new brew, it was beyond the power of the legislature of the State of Michigan to pass any law, the effect of which would prevent the preservation of this property, and necessitate its destruction and loss.

CAN THE WINE AND CIDER CLAUSE BE DECLARED UNCONSTITUTIONAL AND THE REMAINDER OF THE ACT SAVED?

The Supreme Court of Michigan held that the wine and cider clauses could be stricken out, leaving the remainder of the act "complete in itself and capable of being executed wholly independent of that which was rejected." (R. 25.) They say of this portion of the Statute, relative to the manufacture and sale of wine and cider from home-grown fruit, that, in their opinion, it is discriminatory and violates the provisions of the Federal Constitution invoked. We fail to see how it is any more discriminatory than the other provisions of the law relative to the sale of malt, brewed, fermented, vinous, spirituous and intoxicating liquors by druggists and registered pharmacists. In support of the rule of the Court that the wine and cider clause may be stricken out and the balance of the act saved, Cooley's Constitutional Limitations is quoted, as follows:

> "If when the constitutional part is stricken out, that which remains is complete in itself, and capable of being executed, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the mean- of this rule."
>
> *Cooley's Const. Limitations* (*7th Ed.*), pp. 246 and 247.

In determining whether or not the wine and cider clause of this act can be stricken out and the balance of the act saved, or whether one is independent of the other, the "local

option" feature of the act itself must not be lost sight of. It must be remembered that the act is not put into operation and does not affect anybody except upon the vote of the people within the county. If the majority of the voters vote to give it effect, it then becomes operative on the first day of May following, pursuant to the resolution of the Board of Supervisors. The plaintiffs in error are charged with having violated this resolution of the Board of Supervisors. At the election had in April preceding the adoption of this resolution, the wine and cider clause of this act had its effect. Those who received the benefit of the exemption expressed in the wine and cider clause took part in the election. This wine and cider clause was a sop to the farmer and fruit grower, and by means of it, local option was carried in many counties where it otherwise would have failed of adoption. The farmer and fruit grower, knowing that he could manufacture wine and cider and sell it in five-gallon lots, or at wholesale, and knowing also that the effect of the adoption of the local option law within the county would increase the demand for wine and cider from home-grown fruit, was induced to vote in favor of local option, when he otherwise would not.

The purpose of putting such provisos into a law are well understood, and the Court will take notice of them. The legislature of the State of Michigan had left it to the voters of each county to say whether or not local option should be enforced within their county. It makes no difference that the wine and cider clause was adopted as an amendment after the original passage of the act. It was in effect long before local option was adopted in Jackson County and long before the election of April, 1909.

The legislature had adopted this wine and cider amendment and made it a part of the act, and the act must be viewed in its entirety as a thing under which the legislature authorized the people to vote upon the proposition of prohibition. The act itself has no operation whatever except through the election which is had under it, and the exemptions and exceptions condemned by the Supreme Court of the State of Michigan are as much a part of the Michigan law as any of the rest of the act, and have full play in the election. It is the people who give the law effect by their vote, and that vote is cast in view of the provisions of the law. If any of those provisions are unconstitutional, which could be said to have any effect upon the election, the whole act must necessarily be unconstitutional. An act which leads

to a unconstitutional result cannot be saved by construing one part valid and the other part invalid.

When the legislature authorized the people to vote, at the same time adopting certain provisions under which the vote should be taken, and declaring exemptions in favor of a certain class of voters, affecting their attitude towards the question of local option, it must be bound by the act and provisions as a whole, under which the election was to be had. The purpose of the provision in regard to wine and cider was to affect the operation of the act, and the adoption of prohibition within counties voting upon that question, and to say that it can now be discarded and the election upheld is equivalent to saying that one may be punished for violating an act which is admittedly invalid and unconstitutional.

It will be conceded without citing the authorities that a penal act or an act in derogation of the common law must be strictly construed, and, as has very recently been held by the Supreme Court of the State of Michigan:

> "An amendment to a statute will generally be considered as a part of the original act and the entire act as amended be given the construction which would be given it if the amendment were a part of the original act."
>
> *People vs. Michigan Central R. Co.*, 145 *Mich.*, 140.

As was said by Mr. Justice Cooley in a Michigan case:

> "Where such a law creates a system, and the part which is legal cannot stand by itself without the aid of the rest, or is so much affected or disturbed by the rejection of the rest that it could not be supposed the Legislature would have adopted it by itself, the whole shall be rejected, because the part cannot be regarded as the expression of the legislative will."
>
> *Attorney General vs. The Common Council of Detroit*, 29 *Mich.*, 108-114.

Immediately following the quotation, in the opinion of the Supreme Court of Michigan, above referred to, from Cooley's Constitutional Limitations, is a discussion of the subject by the learned author, which I think is much more in point and much more applicable to the case than the portion referred to in the Court's opinion. It is as follows:

"If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.

"It has accordingly been held, where a statute submitted to the voters of a county the question of the removal of their county seat, and one section imposed the forfeiture of certain vested rights in case the vote was against the removal, that this portion of the act being void, the whole must fall, inasmuch as the whole was submitted to the electors collectively, and the threatened forfeiture would naturally affect the result of the vote.

"And where a statute annexed to the city of Racine certain lands previously in the township of Racine, but contained an express provision that the lands so annexed should be taxed at a different and less rate than other lands in the city; the latter provision being held unconstitutional, it was also held that the whole statute must fail, inasmuch as such provision was clearly intended as a compensation for the annexation."

Cooley's Const. Limitations (*7th Ed.*), pp. 247 and 249.

The Michigan local option law had for its purpose a single object only, and that was the conferring of authority upon the voters of each county to say whether or not local option should be enforced within the limits of that county. The result of the vote in each county is made supreme under the law; therefore, everything which enters into that vote becomes an essential part of the whole scheme, and cannot be rejected without invalidating the whole. The vote of the people is the thing which gives the law its effect, and which makes it criminal to do the thing for which the plaintiffs in error in this case are being prosecuted. The exemptions made in

favor of the manufacture of wine and cider naturally affect the result of the vote, just as the threatened forfeiture did in the case respecting the removal of the county seat, and just as the provision in regard to taxes was held to be a compensation for the annexation to the City of Racine referred to in the quotation from Cooley's Constitutional Limitations, aforesaid. This fact seems to have been wholly lost sight of by the Supreme Court of Michigan in rendering its decision, but we regard it as of vital importance, and it will not be contended by anyone familiar with the situation that the decision of the Supreme Court in this case, holding the wine and cider clauses invalid, will have no effect upon the result of elections held in counties throughout the state on the question of local option. If the opinion of the Court holding this clause of the act unconstitutional affects the result of the election, it must be equally true that the clause itself, before it was so declared invalid, effected the result of the election.

I respectfully submit that the act under which plaintiffs in error were convicted is clearly open to the objections urged against it; that it deprives the citizen of the equal protection of the laws and of privileges and immunities guaranteed him under the Constitution; that it takes the property of the citizen without due process of law, and constitutes an unlawful interference with interstate commerce. The judgment of the Supreme Court of the State of Michigan should, therefore, be reversed.

RICHARD PRICE,
Attorney for Plaintiffs in Error.

FILED
JAN 7 1914
JAMES D. MAHER

Supreme Court of the United States

October Term, 1913.

No. 164.

CARL EBERLE, and
STEPHEN H. CARROLL,
Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

RICHARD PEICE,
Attorney for Plaintiffs in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11-17 Lafayette Boulevard.
1913.

Supreme Court of the United States

October Term, 1913.

No. 164.

CARL EBERLE, and
STEPHEN H. CARROLL,
Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

I submit the following as supplementary to that portion of my former brief under the heading:

"CAN THE WINE AND CIDER CLAUSE BE DECLARED UNCONSTITUTIONAL AND THE REMAINDER OF THE ACT SAVED?"

"Reference to an act is to it as modified."

Endlich on Interpretation of Statutes, Sec. 44.

"A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendments had always been there, and the amendment itself becomes so thoroughly a part of the original statute that it must be construed in view of the original statute as it stands after the amendments are introduced."

Endlich on Interpretation of Satutes, Sec. 294.

"When an amendment to a statute is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, namely,

the statute as amended. From this it follows that the legislative intention, in making the amendment, is to be learned from a consideration of the original act and the amendment as one act."

Black on Interpretation of Laws, page 356.

"An amendment of a statute by a subsequent act operates precisely as if the subject matter of the amendment had been incorporated in the prior act at the time of its adoption, so far as regards any action had after the amendment is made. For it must be remembered that the amendment becomes a part of the original act, whether it be a change of a word, figure, line or entire section, or a recasting of the whole language."

Black on Interpretation of Laws, page 357.

The information filed against the plaintiffs in error in the present case charged them with the "violation of the provisions of Act No. 207 of the Public Acts of the State of Michigan for the year A. D. 1889, as amended" (R. 1).

The General Assembly of the State of Ohio passed an act in March, 1851, "referring to the voters of Perry County the question of a removal of the seat of justice of said county," the county seat at that time being at the village of Somerset. The first five sections of this act provided for the submission of the question of the removal of the county seat to New Lexington, and other details, and Section 6 of the act was as follows:

"Sec. 6. Provided, that this act shall not take effect unless the friends of removal on or before the first day of July, 1851, secure to be paid to the commissioners of Perry county, a sufficient amount of money, to be paid in three equal annual installments, to erect suitable buildings in the town of New Lexington (the commissioners to determine the amount necessary). And should the money be secured, as is provided in this section, then it shall be the duty of said commissioners to notify the voters of said county by publication in each of the newspapers of the county, at least four weeks previous to the taking of said vote, that the amount necessary has been secured, then this act to be and remain in full force."

Pursuant to this 6th section, the friends of the removal of the county seat secured to be paid to the commissioners the amount of money by them deemed necessary for the erection

of suitable county buildings in the town of New Lexington. A vote was taken on the question of removal, and resulted by some hundreds majority in favor of removal.

The commissioners then in office entered into a contract for the erection of a court house, jail and other public buildings, to be completed on or before the 1st of April, 1854, and Feigley, the contractor, proceeded with the construction of the buildings, under the direction and supervision of the commissioners, until about the month of November, 1853, when the buildings were nearly completed.

At this time, the then acting commissioners abandoned the buildings and refused to do anything further towards finishing or completing the same, though they were nearly finished, and mostly paid for out of the funds raised by the relators and their friends.

On the 2d of March, 1853, the general assembly passed an act "to provide for the removal of the county seat of Perry county, Ohio, from the town of New Lexington to the town of Somerset, in said county." This act was as follows:

> "Sec. 1. That from and after the taking effect of this act as hereinafter provided, the seat of justice in the county of Perry, shall be removed from the town of New Lexington, and shall be permanently fixed until otherwise provided by law, at the town of Somerset, in said county.
>
> "Sec. 2. That this act shall take effect and be in force when, and so soon as the same shall be adopted by a majority of all the electors of said Perry county, voting at the next general election after the passage thereof, as hereinafter provided.
>
> "Sec. 3. That the electors of said Perry county, at the next general election after the passage of this act, shall indorse on their tickets either the words 'for removal,' or 'against removal;' and if a majority of all the electors of said Perry county, voting at said election, shall vote 'for removal,' this act shall thereupon be considered and holder to be adopted by such majority."
>
> Section fourth provides for counting the votes and certifying the result, and the publication of a copy of the certificate, and the entry of a copy of such certificate upon the records of the court of common pleas of the county, at the term thereof next after the election, etc.

> "Sec. 5. If a majority of said electors of said county voting at said election as hereinbefore provided, shall vote against removal, then all obligations heretofore given to the commissioners of said county, in accordance with the sixth section of an act entitled 'an act referring to the voters of Perry county the question of a removal of the seat of justice of said county,' passed March 22d, 1851, to secure to be paid to the commissioners of said county a sufficient sum of money to erect suitable county buildings in the town of New Lexington, shall be, by said commissioners delivered up to be canceled, and the commissioners shall proceed at once to levy a tax sufficient to erect a court house, jail, and offices for said county, in the town of New Lexington, which court house, jail, and offices shall, in the aggregate, cost not less than sixteen thousand dollars."

In pursuance of this last mentioned act, the electors of Perry county, voting at a general election in October, 1853, adopted the act in the manner specified in the same.

The relators, pursuant to their contract, having advanced all the money that had been paid towards the erection of the building as aforesaid and being bound, with others, to furnish to the commissioners and being willing to furnish such further sums as might be needed to finish the building, claimed that the latter act was in conflict with the constitution of Ohio; that all proceedings under it were null and void, and asked for a writ of mandamus to require the defendants to proceed under the act of March, 1851, and complete the building for the use of the county, etc.

The Supreme Court of Ohio, speaking through Mr. Justice Scott, after discussing said fifth section of the act of 1853, and holding the same to be unconstitutional and void, proceeds as follows:

> "Nor can it fall alone. For, as a general rule, one part of an act will not be held constitutional, and another part unconstitutional, unless the respective parts are independent of each other. The provisions of the fifth section are such as would naturally influence the vote upon the adoption or rejection of the first and main section, and it would be a fraud upon the electors of Perry county, to procure their adoption of the first section, by means of the threatened penalties of the fifth, and then declare the fifth section void, but allow it to accomplish its purpose, by giving vital-

ity and effect to the first, which, without it, would never have been adopted. The provisions of both sections are made equally to depend upon the result of the election; they were submitted by the legislature collectively, to the voters, and could only be passed upon as a whole; and we think they must, therefore, stand or fall together. Such is the doctrine of the case already cited, in which Chief Justice Shaw, after conceding that 'the same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others,' adds: 'But this must be taken with this limitation, that the parts so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with, and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.' 2 Gray's Rep., 98, 99.

"We think, therefore, that the first and main section of the act of 1853, must fall with the fifth; and with it the defense of the respondents must fail."

The State, ex rel. Huston et al vs. The Comm'rs of Perry County, 5 Ohio State Reports, 497-508.

The same reasoning is applicable to the case at bar, only with greater force. The provisions of Section 15, declared to be constitutional by the Supreme Court of the State of Michigan, had their influence upon the vote by which the first and main section of the law was adopted. The inducement held out in those provisions to the farmer and the fruit grower procured the adoption of the first section and the passage of the resolution of the Board of Supervisors, with the violation of which, the plaintiffs in error are charged. And it would be an outrageous infringement upon the constitutional rights of the plaintiffs in error to allow the wine and cider clause, admittedly void and unconstitutional, to "accomplish its purpose, by giving vitality and effect to the first section, which, without it, would never have been adopted."

Respectfully submitted,

RICHARD PRICE,
Attorney for Plaintiffs in Error.

27

Office Supreme Court, U. S.
FILED
JAN 19 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 164.

CARL EBERLE AND STEPHEN H. CARROLL,
PLAINTIFFS IN ERROR.

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

ADDITIONAL AUTHORITIES FOR THE PLAINTIFFS IN ERROR.

RICHARD PRICE,
Attorney for Plaintiff in Error.

(23,006.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 164.

CARL EBERLE AND STEPHEN H. CARROLL,
PLAINTIFFS IN ERROR,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN.

ADDITIONAL AUTHORITIES FOR THE PLAINTIFFS IN ERROR.

I desire to submit the following authorities, which have but recently come to my attention, bearing upon the propositions advanced by plaintiffs in error:

Herman *vs.* State, 8 Ind., 545.

This case arose out of a statute of Indiana which forbid the people of the State to manufacture and sell whiskey, ale, porter, and beer for any purpose except for the Government, to be sold by it as medicine. It was held unconstitutional by the Supreme Court of that State as an invasion by the Government of the faculties of industry belonging to the citizen, in the course of which opinion the court, through Mr. Justice Perkins, said:

> "It is as if the law were that people might eat bread, but should not raise the grain and grind it into flour wherewith to make it. It would be an act to prohibit the people from themselves producing, and to compel them to purchase from abroad what they might need to eat and drink. * * *
>
> "If the manufacture and sale of these articles are proper to be carried on in the State for any purpose, it is not competent for the Government to take the business from the people and monopolize it."

Allgeyer *vs.* Louisiana, 165 U. S., 578-89:

This case arose over a statute forbidding the making of contracts of insurance with companies who had not complied with certain conditions. The Supreme Court of the United States held the law unconstitutional, making use of the following language with reference to the 14th Amendment:

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Butchers' Union, etc., Co. *vs.* Crescent City, 111 U. S., 746-66:

In this case Mr. Justice Bradley, concurring in the decision holding a law of the State unconstitutional which gave the exclusive right to a corporation to provide stock-landings and establish a slaughter house for twenty-five years, made use of the following language:

> "I hold it to be an incontrovertible proposition of both English and American public law, that all *mere* monopolies are odious and against common right."

"The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and *the pursuit of happiness.*' This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution. It is what no Legislature has a right to do; and no contract to that end can be binding on subsequent Legislatures."

Mr. Justice Field, concurring in the same decision, said:

"As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all governmental action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident,' that is, so plain that their truth is recognized upon their mere statement, 'that all men are endowed;' not by edicts of emperors or decrees of Parliament or acts of Congress, but 'by their Creator, with certain inalienable rights,' that is, rights which cannot be bartered away or given away or taken away except in punishment of crime; 'and that among these are life, liberty and the pursuit of happiness, and to secure these,' not grant them but secured them, 'governments are instituted among men, deriving their just powers from the consent of the governed.'

"Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to

pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

The Legislature of the State of Michigan having made a certain trade in liquor, including beer, lawful in dry counties, it could not make the manufacture of beer in those counties to supply that trade unlawful. It could not oblige the people to purchase elsewhere, nor deny them the right to supply a lawful trade. What the government of the State could not monopolize, as was said in Herman *vs.* State, *supra*, it could not turn over to, and create a monopoly of, in favor of the foreign manufacturer. This court has never said that such tyrannical power could be exercised by the State, and the Constitution positively prohibits such legislation.

Respectfully submitted,

RICHARD PRICE,
Attorney for Plaintiff in Error.

IN THE UNITED STATES SUPREME COURT.

Office Supreme Court, U. S.
FILED
DEC 20 1913
JAMES D. MAHER
CLERK

CARL EBERLE AND STEPHEN H. CARROLL,
Plaintiffs in Error,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Defendant in Error.

No. 164

BRIEF FOR DEFENDANT IN ERROR.

GRANT FELLOWS,
Attorney General,
Attorney for Defendant in Error.
Business Address: Capitol, Lansing, Mich.

SUBJECT INDEX.

	PAGE.
Statement	1
Reasons given by plaintiffs in error as basis of motion to quash information	2
Discussion of general objection of repugnancy to Federal Constitution	3
The Commerce Clause of the Federal Constitution	4
Effect of invalid amendments to Michigan Local Option Law	10
Due process of law under XIV Amendment	16
The Fourth Amendment to the Federal Constitution is not applicable to states	23

ALPHABETICAL LIST OF CASES CITED.

	PAGE.
Barren vs. Baltimore, 7 Peter 243	24
Delamater vs. South Dakota, 205 U. S. 93	10
Eilenbecker vs. Plymouth Company, 134 U. S. 31	24
Feek vs. Bloomingdale Township Board, 82 Mich. 393	13
Friesner vs. Charlotte Common Council, 91 Mich. 504	13
Kidd vs. Pearson, 128 U. S. 1	4
Mugler vs. Kansas, 123 U. S. 623	16
Ohio Ex rel Lloyds vs. Dollinson, 194 U. S. 445	22
People vs. Eberle, 167 Mich. 477	3
Presser vs. Illinois, 116 U. S. 252	15
Ripley vs. Texas, 193 U. S. 504	22
Tiernan vs. Rinker, 102 U. S. 123	15

IN THE UNITED STATES SUPREME COURT.

CARL EBERLE AND STEPHEN H. CARROLL, *Plaintiffs in Error.* vs. THE PEOPLE OF THE STATE OF MICHIGAN, *Defendant in Error.*	No. 164

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Plaintiffs in error, Eberle and Carroll, were stockholders and the managing officers of the Eberle Brewing Company, located at the City of Jackson, in the County of Jackson and State of Michigan. They conducted this brewery, brewing lager-beer prior to the first day of May, 1909, at which time the manufacturing of beer was prohibited by operation of the

Local Option Law of the State. On the 11th day of September following they were found to be manufacturing lager-beer and this prosecution followed. Upon the trial in the initial court, being the Circuit Court for the County of Jackson, the regularity of the proceedings in the adoption of the Local Option law in that County was admitted, and it was also admitted that the plaintiffs in error were, and had been since the Local Option Law took effect, engaged in the business of manufacturing beer, their claim being that at the time the Local Option Law took effect they had from sixteen to seventeen hundred barrels of beer on hand, worth Five Dollars per barrel, which they had been unable to dispose of before the Local Option Law took effect. We quote from the testimony (R. 9):

> "We did, between the first day of May and 11th of September make lager-beer there * * *.
>
> Q. The purpose of making new lager-beer and adding it to the old beer, that was done for the purpose of keeping the old beer in good condition and marketable?
>
> A. Yes, sir."

The plaintiffs in error moved to quash the information for the following reasons:

(First) The general allegation that the Local Option Law is repugnant to the Constitution of the United States and the State of Michigan.

(Second) That the Local Option Law is repugnant to paragraph III, Section 8 of Article I (Commerce Clause) of the Constitution of the United States.

(Third) Because the Local Option Law is repugnant to Section 2 of Article IV of the Constitution of the United States.

(Fourth) Because the Local Option Law is in violation of the XIV Amendment to the Constitution of the United States.

(Fifth) Because the Local Option Law is repugnant to the

IV Amendment to the Constitution of the United States and a similar provision of the Michigan Constitution.

This motion to quash the information was over-ruled and the same questions were later raised during the trial and were over-ruled. The conviction was reviewed in the Supreme Court on exceptions before sentence, and is reported as

People vs. Eberle, 167 Mich. 477.

The State Court held that certain amendments which had been engrafted upon the Local Option Law, and which exempted from the operation of the Act—

> "The sale of wine or cider from home grown fruit in quantities of not less than five gallons; nor shall the provisions of the Act be construed to prohibit the manufacture of wine or cider; nor shall the provisions of this Act be construed to prohibit the sale at wholesale of wine or cider manufactured in said County to parties who reside out of said County."

were discriminatory and invalid, but that since the Act with such amendments eliminated is complete in itself, capable of being executed independently of such amendments, it was valid except as to such amendments: and affirmed the conviction. The writ of error was then sued out to this Court.

ARGUMENT.

I.

The first objection raised is too general to be discussed, the general allegation being that the Local Option Law of the State "is repugnant to the Constitution of the United States and therefore void." This allegation is too general to require

consideration and the specific clauses of the Constitution which it is claimed in later objections that the Act infringes must be regarded as the limit beyond which the court can not be called to inquire.

II.

It is urged that the Act is in conflict with the commerce clause of the Federal Constitution. There is no claim in the testimony that the Respondent was in any way engaged in inter-state commerce; there is no testimony that at the time of the adoption of the Local Option Law in Jackson County that plaintiffs in error, or their Company, were engaged in transporting or shipping beer in inter-state commerce. However, if they were they could not be aided in any degree. Even before the passage of the Wilson Act this Court had the same question under consideration in

Kidd vs. Person, 128 U. S. 1.

The question there under consideration was the prohibition of the manufacture of intoxicating liquors in prohibited territory, the Answer of Kidd in the initial court alleging that all of the liquors manufactured by him were for exportation and were sold outside the State of Iowa, and while in the case at bar there is no such claim, or testimony tending to sustain such claim, this Court there determined that the State under its police power had the right to regulate and prohibit the manufacture of intoxicating liquors within its borders even though such liquor when manufactured was not to be sold therein. We quote fully from the language of Mr. Justice Lamar speaking for the court in that case (P. 19):

> "It is a mistake to say, as to this case, that the act of transporting the alcohol from the State in the course of lawful commerce with other States not being a crime,

to perform that act was not a criminal intent, no matter when formed, whether before or after the alcohol was manufactured. It is not the criminality of the intent to *export* that is here the question, but it is the innocence or criminality, under the statute of the *manufacture*, in the absence of all four of the specific exceptions to the prohibition, the actual and controlling and *bona fide* presence of at least one of which was indispensable to the legality of the manufacture.

We think the construction contended for by plaintiff in error would extend the words of the grant to Congress, in the Constitution, beyond their obvious import, and is inconsistent with its objects and scope. The language of the grant is, 'Congress shall have power to regulate commerce with foreign nations and among the several States,' etc. These words are used without any veiled or obscure signification. 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said.' *Gibbons v. Ogden, supra, at page 188.*

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in County of *Mobile v. Kimball*, 102

U. S. 691, 702, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property as well as the purchase, sale and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplates the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be, local in all the details of their successful management.

It is not necessary to enlarge on, but only to suggest the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details.

It was said by Chief Justice Marshall, that it is a matter of public history that the object of vesting in Congress the powers to regulate commerce with foreign nations and among the several States was to incur

uniformity of regulation against conflicting and discriminating state legislation. See also *County of Mobile v. Kimball, supra,* at page 697.

This being true, how can it further that object so to interpret the constitutional provision as to place upon Congress the obligation to exercise the supervisory powers just indicated? The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyz-

ing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine.

We find no provisions in any of the sections of the statute under consideration, the object and purpose of which are to exert the jurisdiction of the State over persons or property or transactions within the limits of other States; or to act upon intoxicating liquors as exports, or while they are in process of exportation or importation. Its avowed object is to prevent, not the carrying of intoxicating liquors *out* of the State, but to prevent their manufacture, except for specified purposes *within* the State. It is true, notwithstanding its purposes and ends are restricted to the jurisdictional limits of the State of Iowa, and apply to transactions wholly internal and between its own citizens, its effects may reach beyond the State by lessening the amount of intoxicating liquors exported. But it does not follow that, because the products of a domestic manufacture may ultimately become the subjects of interstate commerce, at the pleasure of the manufacturer, the legislation of the State respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress. Can it be said that a refusal of a State to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in forbidding the retail within her borders of the same articles after they have left the hands of the importers? That the latter could be done was decided years ago; and we think there is no practical difference in principle between the two cases.

As has been often said, 'legislation (by a State) may in a great variety of ways affect commerce and per-

sons engaged in it, without constituting a regulation of it within the meaning of the Constitution,' unless, under the guise of police regulations, it 'imposes a direct burden upon interstate commerce,' or 'interferes directly with its freedom.' Hall v. De Cuir, 95 U. S. 485, 487, 488, Chief Justice Waite delivering the opinion of the court in that case, citing Sherlock v. Alling, 93 U. S. 99, 103; State Tax on Railway Gross Receipts, 15 Wall. 284; Munn v. Illinois, 94 U. S. 113; Chicago, Burlington and Quincy Railroad Co. v. Iowa, 94 U. S. 155; Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245; Pound v. Turck, 95 U. S. 459; Gilman v. Philadelphia, 3 Wall. 713, Gibbons v. Ogden, supra; and Cooley v. Board of Wardens, etc. 12 How. 299.

We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer *intends* to export the liquors when made? Does the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?

These questions are well answered in the language of the Court in the License Tax Cases, 5 Wall. 462, 470: 'Over this commerce and trade (the internal commerce and domestic trade of the States) Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers

clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject.' The manufacture of intoxicating liquors in a State is none the less a business within that State, because the manufacture intends, at his convenience, to export such liquors to foreign countries or to other States."

This decision was before the passage of the so-called Wilson Act and since the passage of the Wilson Act the states have been permitted to regulate the business of manufacturing and dealing in intoxicating liquors even to the extent of sustaining an Act requiring the payment of a license by a person who solicited orders for intoxicating liquors, which orders were subject to acceptance outside the State and the orders being filled by an interstate shipment. See

Delamater vs. South Dakota, 205 U. S. 93.

We therefore state with reference to the question of interstate commerce that there is no proof that plaintiffs in error were engaged in the manufacture of beer to be shipped outside the State: that a state had the lawful right in the absence of the Wilson Act to prevent the manufacture of brewed or intoxicating liquors within its borders which were designed for shipment outside the State, and that the right of the State to regulate the business of manufacturing and selling intoxicating liquors is absolutely set at rest by the Wilson Act and the decisions of this Court construing it.

III.

The State Court held with the plaintiffs in error that the amendments heretofore adverted to and which exempted the manufacture of cider and wine from home grown fruit were

in conflict with Section 2 of Article IV of the Federal Constitution which provides:

> "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."

but held that the Local Option Law was a workable, valid, complete Act of itself before these amendments were engrafted and capable of being administered independently of them; and that therefore the Section under which the plaintiffs in error were convicted was a valid provision and not affected by the invalidity of the amendments. The original Local Option Act of Michigan was passed in 1889 and is known as

Act 207 Public Acts of 1889.

Section 1 of this Act (being the section under which the Plaintiffs in error were prosecuted and convicted) provides as follows:

> "That it shall be unlawful for any person, directly or indirectly, himself or by his clerk, agent or employe, to manufacture, sell, keep for sale, give away or furnish any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, or any mixed liquor or beverage, any part of which is intoxicating, or to keep a saloon or any other place where any such liquors are manufactured, sold, stored for sale, given away or furnished, in any county of this state on and after the first day of May, next following after the adoption by the board of supervisors of such county of a resolution prohibiting the same, as provided in section thirteen of this act, so long as such resolution remains unrepealed: Provided, however, That the provisions of this section shall not apply to druggists, or registered pharmacists, in selling any

such liquors under and in compliance with the restrictions and requirements imposed upon them by the general laws of this State."

Section 2 of the Act provides for the suspension of the general license law in counties adopting Local Option in the following language:

> "On and after the first day of May next following after the adoption by the board of supervisors of any county of a resolution prohibiting the manufacture of liquors and the liquor traffic, as hereinafter provided in section thirteen of this act, the provisions of the general laws of this state for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving away or delivering spirituous and intoxicating liquors, and malt, brewed or fermented and vinous liquors shall be and the same are hereby declared suspended and superseded so far as relates to the territory and municipalities within the limits of any such county: Provided, however, That all sales of liquors by druggists, or registered pharmacists, in such counties shall be under the restrictions and requirements imposed upon them by the general laws of this state."

Other sections provide the machinery for holding the election and administrative features. The only section in addition to those above quoted important here, is Section 15 which in the original Act read as follows:

> "The prohibitory provisions of this Act shall take effect and have full force within such county of this state on and after the first day of May immediately following the adoption by the board of supervisors of such county of the resolution ordering such prohibition and upon publication of the notice of the adoption of such

resolution: Provided, however, That nothing in this act shall be so construed as to prohibit the sale of wine for sacramental purposes, nor shall anything herein contained prohibit druggists or registered pharmacists from selling or furnishing pure alcohol for medicinal, art, scientific and mechanical purposes."

The Act was sustained as valid by the State Court in

Friesner vs. Charlotte Common Council, 91 Mich. 504.
Feek vs. Bloomingdale Township Board, 82 Mich. 393.

The Act continued in force without amendment until 1899 when Act 183 of the Public Acts of 1899 was passed. No material change was made in Section 1, but to the proviso of Section 15, above quoted, there was added the following words: "nor prohibit the sale of wine or cider from home grown fruit in quantities of not less than five gallons." In 1903 the Act was again amended solely with reference to said Section 15, by Act 170 of the Public Acts of 1903 by adding the further proviso thereto: "Nor shall the provisions of this Act be construed to prohibit the manufacture of wine or cider; nor shall the provisions of this Act be construed to prohibit the sale at wholesale of wine or cider manufactured in said County to parties who reside outside of said County." It will therefore be seen by an examination of this legislation that in the original local option law of the State the discriminatory features here assailed were wanting, and that these discriminatory provisions were added by the Legislature of 1899 and the Legislature of 1903.

We therefore have presented to us the question as to whether an Act in all regards valid becomes invalid by the adding of an invalid amendment; or, to restate it, does the engrafting of an invalid proviso by way of amendment onto a valid statute render such statute invalid, or does such Act

stand unaffected by the subsequent invalid legislation? It seems to us that to state this proposition is to answer it. The amendment is absolutely void, and, being void, the original Act stands unhampered and untrammeled by the invalid addition. But in addition to that it was the view of the State Court that the original Act in question was a complete Act in and of itself; that it was capable of being executed independently of such amendment, and that therefore it was not affected by the invalidity of such amendments, and the following language from Judge Cooley was quoted with approval:

> "A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void, because they are associated in the same act, but not connected with or dependent on others, which are unconstitutional. Where, therefore, as part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other. * * * The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional part is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was re-

jected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule." Cooley's Constitutional Limitations (7th Ed), pp. 246 and 247, notes and cases cited.

We respectfully submit to the Court that this was the determination by the State Court of a State question and does not raise a Federal question: but, beyond this, the rule laid down by Judge Cooley, and approved by the State Court, is the correct rule. We quote what was said by this Court, in

Presser vs. Illinois, 116 U. S. 252, 263.

"We have not found it necessary to consider or decide the question thus raised, as to the validity of the entire Military Code of Illinois, for, in our opinion, the sections under which the plaintiff in error was convicted may be valid, even if the other sections of the act were invalid. For, it is a settled rule 'that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable.' Packet Co. v. Keokuk, 95 U. S. 80; Penniman's Case, 103 U. S. 714, 717; Unity v. Burrage, 103 U. S. 459. See also Trade Mark Cases, 100 U. S. 82."

The conviction of the plaintiffs in error was not for violating the invalid sections of the Act in question, but was for the violation of the valid section of the Act. The fact that the plaintiffs in error were engaged in a business made unlawful by a valid section of this Act does not render them immune from prosecution because of the invalidity of certain other provisions. See—

Tiernan vs. Rinker, 102 U. S. 123.

This case arose before the Wilson Act was enacted and involved the validity of a license law which required the payment of a license upon the business of selling liquors brought into the State in interstate commerce, and also liquors produced in the State. It was held that the regulation with reference to the liquors coming into the State in interstate commerce was invalid, but inasmuch as the respondent had engaged in the business of selling domestic wines and liquors his conviction should be affirmed.

We respectfully submit that the State Court was correct in its holding, and, further, that its holding presents no Federal question because it is a construction of a local state law and the Court having construed the State Law to be a workable, enforcible, complete Act, independent of these invalid amendments, no Federal question is presented for review as far as this objection is concerned.

IV.

It is urged that the plaintiffs in error have been deprived of their property without due process of law and in violation of the Fourteenth Amendment. This question we respectfully submit is not and has not been an open question since the determination of this Court in

Mugler vs. Kansas, 123 U. S. 623.

We respectfully submit that an examination of that case shows that every question raised in the instant case was there raised, there considered and there determined. It was there urged that Mugler had a considerable sum of money invested in his brewery; that it was not valuable for other purposes; that the single sale of which he was convicted was of beer manufactured before prohibition was adopted in Kansas; that there was no testimony but that he was brewing the beer

for his own use; but the validity of the Kansas constitutional prohibition and its laws enacted to put such prohibition into force was upheld as within the police power of the State. We quote to some extent from that case:

> "Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessed result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of gov-

ernment shall not usurp powers committed by the Constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the makers' own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 27, 31, that the Four-

teenth amendment had no such effect. After observing, among other things, that that Amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoilation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the Amendment—broad and comprehensive as it is,—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. (citing authorities).

Upon this ground—if we do not misapprehend the position of defendants—it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property; or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other

words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments. This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. * * * *

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitution of merely all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owners' use of it shall not be injurious to the community. Beer Co. v. Massachusetts, 97 U. S. 25, 32; Commonwealth v. Alger, 7 Cush. 53. An illustration of this doctrine is afforded by Patterson v. Kentucky, 97 U. S. 501. * * * *

As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the com-

munity, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of *his* property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can the legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent power.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any as-

surance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi* above cited, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in Beer Co. v. Massachusetts, 97 U. S. 32: 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer.'"

The Texas Local Option Law was before this Court in

Ripley vs. Texas, 193 U. S. 504,

and upon the authority of the Mugler case it was held that the State had absolute power over the sale of intoxicating liquors; that it may prohibit it altogether, or conditionally as it sees fit, sustaining the Local Option Law of that state, the general scheme of which is similar to the Michigan Act.

The Ohio Local Option Act was under consideration in this Court in

Ohio ex rel Lloyds vs. Dollison, 194 U. S. 445,

Where the Ripley case was cited with approval and the right of the State to pass a Local Option Law was upheld. These decisions are upon the theory that it is within the police power of the State to license, to regulate, to prohibit the

manufacture and sale of intoxicating liquors, and that whether the general welfare of the State requires the enactment of such laws is a question for the State to determine. We therefore respectfully submit that the theory advanced by the plaintiffs in error that they were deprived of their property without due process of law because the State had seen fit to prohibit the manufacture of beer, either as applied to the State at large, or to any of its units, is without foundation, is no longer an open question; and is without merit.

V.

With reference to the Fifth question the State Court said: "The remaining objection that this act provides for unreasonable searches and seizures has received but little attention in the Briefs or upon the oral argument. Our examination of these provisions satisfies us that the objection is not well taken."

Under this head the point was made by the Plaintiffs in error that the search and seizure section of the Local Option Act was in conflict with the fourth amendment and a similar provision found in the Michigan Constitution. The provision found in the Michigan Constitution is as follows:

> "The person, houses, papers and possession of every person shall be secure from unreasonable searches and seizures. No warrant to search any place, or to seize any person or thing, shall issue without describing them nor without probable cause supported by oath or affirmation."

In 1909, some additions were made to the Local Option Act among them being Sections 27, 28 and 29, which provide for the issuance of a search warrant only upon a complaint, on oath, before the Magistrate, and requires a description of the

premises to be searched. In other words, these provisions are squarely within both the State Constitution with reference to search and seizure, and the Fourth Amendment. There is nothing in this record to show that any invalid warrant of search was issued in the case at bar. The State Court held that the Act did not conflict with the search and seizure provision, and we respectfully submit that this determination is final. That the Fourth Amendment does not apply to state legislation, and is solely a restriction upon the powers of the Federal Government, see

Eilenbecker vs. Plymouth Co. 134 U. S. 31, 34.

At the last cited page it was said:

> "The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States. Livingston v. Moore, 7 Pet. 469; The Justice v. Murray, 9 Wall. 274; Edwards v. Elliott, 21 Wall. 532; United States v. Cruikshank, 92 U. S. 542; Walker v. Sauvinet, 92 U. S. 90; Fox v. Ohio, 5 How. 410; Holmes v. Jennison, 14 Pet. 540; Presser v. Illinois, 116 U. S. 252."

See also upon the same proposition what was said by Chief Justice Marshal, in

Barren vs. Baltimore, 7 Pet. 243.

Upon this proposition we respectfully submit to the Court that the 4th amendment was a restraint upon Federal action.

not upon State action, and therefore is not a question that is available here; and, further, that the provisions of the Michigan State with reference to search and seizure are in all regards valid and legal.

We have not been favored with the Brief of the plaintiffs in error and so have taken up all questions which could possibly be raised by them upon this record. We respectfully submit that none of the rights of the plaintiffs in error under the Federal Constitution have been infringed by the Act in question and that the holding of the Supreme Court of the State is correct and should be affirmed.

GRANT FELLOWS,
Attorney General,
Attorney for Defendant in Error.

EBERLE *v.* PEOPLE OF THE STATE OF MICHIGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 164. Argued January 16, 19, 1914.—Decided March 23, 1914.

The validity of a local option law adopted after amendments is not affected by the fact that the amendments are subsequently declared to be unconstitutional.

Unconstitutional amendments to a constitutional statute are mere nullities.

Whether the adoption by a district of a local option statute is affected by the subsequent determination by the courts that certain features of the act were unconstitutional, is not a Federal question and is for the state court to determine.

On writ of error under § 237, Judicial Code, this court cannot inquire

into motives or arguments which influenced electors to vote for or against a measure, or reverse the action of the state court on the ground that the electors voted under misapprehension.

A State may prohibit the sale of liquor absolutely or conditionally; may prohibit the sale as a beverage and permit it for medicinal purposes; may prohibit the sale by merchants and permit it by licensed druggists; and so *held*, that the Michigan Local Option Act of 1889 is not unconstitutional under the equal protection provision of the Fourteenth Amendment on account of discrimination in making certain specific exceptions to the general prohibition.

While a liquor law which prohibited the sale of property existing at the time of its enactment might be confiscatory (*Bartemeyer* v. *Iowa*, 18 Wall. 129), the prohibition of manufacturing liquor after the enactment is not confiscatory even as applied to liquor manufactured for the purpose of giving value to a product existing but unfinished when the act was passed.

Liquor laws are enacted by virtue of the police power to protect the health, morals and welfare of the public; and, while such laws may operate to depreciate the value of property used in the manufacture of liquor, such depreciation is not the taking of property without due process of law as prohibited by the Fourteenth Amendment, and so *held* as to the Michigan Local Option Act of 1889. *Mugler* v. *Kansas*, 123 U. S. 623.

Nothing in the record in this case indicates that the Michigan Local Option Act of 1889 in any way interferes with or is a burden upon interstate commerce.

167 Michigan, 477, affirmed.

THE facts, which involve the constitutionality of the Michigan Local Option Act of 1889 under the commerce, due process and equal protection clauses of the Federal Constitution, are stated in the opinion.

Mr. Richard Price for plaintiffs in error:

The Local Option Act is repugnant to the Constitution of the United States.

It is an arbitrary and unfair discrimination against home manufacturers.

The act protects certain traffic.

The invalidity of the wine and cider clause invalidates

entire act. *Atty. Gen'l* v. *Detroit*, 29 Michigan, 108; *Bartemeyer* v. *Iowa*, 18 Wall. 129, *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; Cooley's Const. Limitations (7th ed.), pp. 246, 247, 249; *Eubank* v. *Richmond*, 226 U. S. 137; *Giozza* v. *Tiernan*, 148 U. S. 655; *Kidd* v. *Pearson*, 138 U. S. 1; *Mugler* v. *Kansas*, 123 U. S. 623; *People* v. *Michigan Central R. Co.*, 145 Michigan, 140; *Walling* v. *Michigan*, 116 U. S. 446. See also *Herman* v. *State*, 8 Indiana, 545; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Butchers' Union* v. *Crescent City*, 111 U. S. 746, 766.

Mr. Grant Fellows, Attorney General of the State of Michigan, for defendant in error:

The Michigan Local Option Act is not unconstitutional under either the commerce clause, the Fourth Amendment or the Fourteenth Amendment. *Barron* v. *Baltimore*, 7 Pet. 243; *Delamater* v. *South Dakota*, 205 U. S. 93; *Eilenbecker* v. *Plymouth Co.*, 134 U. S. 31; *Feek* v. *Bloomingdale*, 82 Michigan, 393; *Friesner* v. *Charlotte*, 91 Michigan, 504; *Kidd* v. *Pearson*, 128 U. S. 1; *Mugler* v. *Kansas*, 123 U. S. 623; *Lloyds* v. *Dollison*, 194 U. S. 445; *People* v. *Eberle*, 167 Michigan, 477; *Presser* v. *Illinois*, 116 U. S. 252; *Ripley* v. *Texas*, 193 U. S. 504; *Tiernan* v. *Rinker*, 102 U. S. 123.

Mr. Justice Lamar delivered the opinion of the court.

The Michigan Local Option Law of 1889 (Pub. Acts, No. 207), makes it unlawful to manufacture or sell malt, vinous, spirituous or intoxicating liquors in any county where a majority of the electors vote in favor of prohibition.

The provisions of the law, however, do not (§ 1) apply to druggists selling such liquors in compliance with the restrictions imposed upon them by the general laws of this State. It was also provided (§ 15) that "nothing in this act shall be so construed as to prohibit the sale of wine for sacramental purposes, nor shall anything herein con-

tained prohibit druggists or registered pharmacists from selling or furnishing pure alcohol for medicinal, art, scientific and mechanical purposes;" Public Acts of Michigan for 1889, pp. 287, 293.

By amendments passed in 1899 and 1903 (acts of 1899, p. 280; acts of 1903, p. 229), it was further provided that the act should not be construed to "prohibit the sale of wine or cider made from home grown fruit in quantities of not less than five gallons, nor . . . to prohibit the manufacture of wine or cider, nor . . . to prohibit the sale at wholesale of wine or cider manufactured in said [dry] county to parties who reside outside of said county."

As a result of an election held April 13, 1909, the law became operative in Jackson County on May 1st, 1909. The defendants, who were officers of a brewing company, were charged with having thereafter manufactured beer in that county, in violation of the statute. They moved to quash the Information, upon the ground that the act was void because it interfered with interstate commerce, took property without due process of law, and so discriminated against them and other manufacturers residing in dry counties as to deny them the equal protection of the law. These defenses were overruled. On the trial they offered evidence tending to show that the beer which they had manufactured had not been made for sale, but to be used in causing re-fermentation of 1600 barrels of beer worth $5 a barrel, which was on hand at the date of the election, with a view of making it salable, and thereby save themselves against loss. Under the charge of the court, the jury returned a verdict of guilty. The case was then taken to the Supreme Court of Michigan, which held (167 Michigan, 477) that the amendments of 1899 and 1903 (permitting the manufacture and sale of wine and cider in dry counties), were void as an unlawful discrimination against the products and citizens of other States and

a violation of the equal protection clause of the Constitution. The court, however, sustained the conviction and sentence of defendants upon the ground that the original Local Option Act was constitutional and had not been rendered invalid by the void amendments of 1899 and 1903. The case was then brought here where, in addition to the errors previously assigned, the plaintiffs in error—defendants in the trial court—insisted that the court erred in holding that the act could be valid if the amendments relative to wine and cider were stricken—said provisions "being a part of the Act at the time the Local Option Law was adopted in Jackson County, where defendants reside, and operating, together with the other provisions of the Act, to bring about such adoption."

1. The argument here was principally directed to a discussion of this assignment of error—the defendants contending that the discriminatory wine-and-cider amendments formed an integral part of the law (Endlich on Statutes, §§ 94, 294) which had been submitted to the voters and which, when adopted, it was claimed, was adopted as a whole. It was insisted that the provisions permitting the manufacture and sale of wine and cider induced many to vote for the law as amended, and it was, in effect, argued that these amendments could not be treated as a part of the statute for the purpose of carrying the election and then be held void in order to save the law from being set aside as discriminatory. In support of this contention, defendants relied on *State ex rel. Huston* v. *Commissioners*, 5 Oh. St. 497, where the court was considering a local option statute, one section of which provided for an election to determine whether a county seat should be removed, and another (§ 5) contained unconstitutional provisions which were such "as would naturally influence the vote upon the adoption or rejection of the first and main section." It was held that: "The provisions of both sections are made equally to depend upon

the result of the election; they were submitted by the legislature collectively to the voters, and could only be passed upon as a whole; and . . . must, therefore, stand or fall together." But in that case the valid and invalid provisions formed an inseparable part of a single act which was void as a whole, whether treated as having been adopted by the legislature or the people. On the other hand in the case at bar the original Local Option Law of 1889 had been held to be constitutional as a whole, and its validity could not be impaired by the subsequent adoption of what were in form amendments but, in legal effect, were mere nullities.

2. It is true that the fact that these amendments were on the statute book may have influenced electors. Some may have voted for the law because of the supposed permission to make wine. Others may have opposed its adoption because of the supposed exemption of wine from the operation of the act. But in either event these void amendments were not a part of the law but extraneous inducements which may or may not have determined the result. The attack, therefore, goes rather to the regularity of the adoption than to the constitutionality of the statute after it had been adopted for Jackson County. But it was for the state court to determine that matter and to decide whether the election was void because the question apparently submitted was the adoption of the law and amendments, when, in reality, only the law itself was submitted. This court, on writ of error from a state court cannot inquire into the motives or arguments which influence men to vote for or against a measure. Neither can we reverse the decision of the state court, and declare the act inoperative in Jackson County because the electors thereof may have voted under a misapprehension as to the matter submitted, any more than we could set aside a statute because it had been enacted contrary to parliamentary rules relating to the introduction, debate and

passage of a bill. The original Local Option statute had been held to be constitutional, and prohibited, without discrimination, the manufacture of all liquors. That valid act the defendants violated and their conviction cannot be set aside on the ground that some or all of the electors voted to make the law operative in Jackson County under the supposition that as wine could be manufactured, the equal protection clause of the Constitution would make it likewise lawful to manufacture beer and other liquors.

3. Nor can the judgment be reversed because the original act, while prohibiting liquor to be sold by merchants permitted it to be sold by druggists for medicinal, mechanical or scientific purposes. The contention that this was an unlawful discrimination is answered by *Kidd* v. *Pearson*, 128 U. S. 1; *Rippey* v. *Texas*, 193 U. S. 504; *Lloyd* v. *Dollison*, 194 U. S. 445. Those cases show that the State may prohibit the sale of liquor absolutely or conditionally; may prohibit the sale as a beverage and permit the sale for medicinal and like purpose; that it may prohibit the sale by merchants and permit the sale by licensed druggists.

4. It was further contended that the act takes property without due process of law because it made no provision for the sale of liquor on hand at the time the law became operative. But the record does not call for a decision of that question, nor does it bring the case within the principle, suggested in *Bartemeyer* v. *Iowa*, 18 Wall. 129, 133, that a statute absolutely prohibiting the sale of property in existence at the time of the passage of the law would amount to confiscation and be void as depriving the owner of his property without due process of law. The defendants were not charged with selling property which was in their possession when the law went into effect in May, 1909, but with manufacturing beer in September, 1909, several months after its adoption. The fact that such beer may have been made for use in starting re-fermentation of

other beer that was on hand when the law became operative, does not bring the case within the principle for which the decision is cited. For the right to manufacture beer to be utilized in giving value to an unfinished brew is no more protected by the Constitution than the right to manufacture beer in order to utilize the brewery and thereby preserve the value of the plant as a going concern.

Liquor laws are enacted by virtue of the police power to protect the health, morals and welfare of the public. Such laws may operate to depreciate the principal value of distilleries, breweries and other property, in use and on hand when the law is passed, but it has been held in many cases that such depreciation is not the taking of property prohibited by the Constitution. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Mugler* v. *Kansas*, 123 U. S. 623. There is nothing in the record calling for a discussion of the assignment of error relating to interstate commerce. The judgment must be

Affirmed.